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PART I - STATUS OF CHILDREN, REVISED REPORT, 1991

A. Introduction

(1) Background to Report

In 1976, the Institute published *Report No. 20* on *Status of Children*. In it, we recommended the abolition of the statuses of legitimacy and illegitimacy in favour of a law providing for the equal treatment of all children in relation to their parents and other kindred, regardless of the child's birth within or outside marriage. In 1985, the Institute updated its 1976 recommendations and published *Report No. 45* entitled *Status of Children: Revised Report, 1985*. The update was undertaken at the request of the government following a review, by the Alberta Legislature's all-party Standing Committee on Law and Regulations, of outstanding Institute reports and the Committee's endorsement of the principles embodied in *Report No. 20*. Despite the request, legislation removing the discrimination against children on the basis of their birth outside marriage has not been enacted, although the *Parentage and Maintenance Act* incorporates some of our ideas in amended form for the limited purpose of maintenance.

(2) United Nations *Convention on the Rights of the Child*

In 1990, Canada announced its intention to ratify the United Nations *Convention on the Rights of the Child*,[1] in the approval of which it had played a leading role. The *Convention* expressly protects children from discrimination on the basis of "birth or other status" in the areas covered in it. These areas include the right of a child: as far as possible, to know and be cared for by the child's parents (article 3.1), who have the primary responsibility for the upbringing and development of the child (article 18.1); where separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis (article 9.3); and to be heard in any judicial and administrative proceedings affecting the

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1 The *Convention on the Rights of the Child* was adopted by the United Nations on November 20, 1989; it came into force on September 2, 1990, on which date the twentieth instrument of ratification was deposited with the U.N. Secretary-General. As of November 15, 1990, 54 countries had ratified the *Convention* (meaning that they had accepted its terms and agreed to comply with them), and 130 other countries, including Canada, were official signatories to the *Convention* (meaning that they had acknowledged receiving notice of it).

child (article 12.2). These rights are governed, and may be modified, by the application of the principle of the child's best interests.

It is evident that the *Convention* supports and reinforces the Institute's recommendations for the equal treatment of all children in relation to their parents and other kindred, regardless of the birth of a child within or outside marriage.

In preparation for Canada's ratification of the U.N. *Convention*, the federal government has asked the provinces and territories to bring their laws into compliance with it. News of this request motivated this Institute to update and republish, for the second time, our recommendations for reform of the law on the status of children in Alberta.

(3) Other Changes Since 1976 or 1985

The basic principles on which our recommendations are founded have remained solidly intact over the years. However, there has been much movement on matters of related detail. Four areas of movement are described below.

First, support for the equal treatment of all children is found in the constitutional case law interpreting the *Canadian Charter of Rights and Freedoms*. The *Charter* took effect, for the most part, on April 17th, 1982, with the guarantee of equality rights, in section 15, taking effect three years later on April 17th, 1985. In Alberta, for example, a court declared section 23(1)(b) of the *Maintenance and Recovery Act* of no force and effect (*M.(L.M.S.) v. Alberta (Attorney-General)* (1990), 74 D.L.R. (4th) 403 (Alta. Q.B.)). That section provided for the automatic discontinuance, on the marriage of the mother, of an order requiring the father to pay maintenance for a child born outside marriage. The relevant Part of the *Maintenance and Recovery Act* has since been repealed and replaced by the *Parentage and Maintenance Act*. In Nova Scotia, a court declared unconstitutional a section in that province's *Intestate Succession Act* which provided that an illegitimate child can succeed to property only from the estate of the mother and not from the estate of the father (*Surette v. Harris Estate*, (1989), 233 A.P.R. 418, 34 E.T.R. 67 (N.S.S.C.T.D.)). Section 13 of Alberta's *Intestate Succession Act* is identical to the impugned provision.

Second, the growing powers of the Provincial Court in the areas of guardianship, custody and access, and the differences between this jurisdiction and that exercised by the Court of Queen's Bench, have produced a confusing array of

case law regarding the position of the father of a child born outside marriage -- although the father's standing to apply for custody or access is now clearer than it was a few years ago. The constitutionality of provincial legislation conferring jurisdiction on the Provincial Court, concurrent with the jurisdiction of the Supreme Court, to make guardianship orders was upheld by the Supreme Court of Canada in 1982 on a reference reported as *Re B.C. Family Relations Act*, [1982] S.C.R. 62, [1982] 3 W.W.R. 1, 40 N.R. 206. Since 1985, the Provincial Court of Alberta has had jurisdiction under section 53 of the *Child Welfare Act* to grant private guardianship orders. In 1984, in the case of *D.(W.) v. P.(G.)* (1984), 32 Alta. L.R. (2d) 232, [1984] 5 W.W.R. 289, 41 R.F.L. (2d) 229, 12 C.C.C. (3d) 161, 11 D.L.R. (4th) 321 (sub nom. *Re D. and P.)*, 54 A.R. 161, the Alberta Court of Appeal recognized the common law jurisdiction of the Provincial Court to "deem guardianship" in cases where the claim that a man is the father of a child is not actively contested; however, more recent case law in the trial courts indicates that the subsequent proclamation of section 53 of the *Child Welfare Act* may have ousted the common law jurisdiction.

Third, significant legislative changes have taken place since 1985. The new *Child Welfare Act*, which was proclaimed into force July 1, 1985, just before the publication of our revised report, has undergone amendment. Of particular relevance is an amendment in 1988 that redefined the role formerly played by the Children's Guardian, eliminating that office and introducing the office of Children's Advocate in its stead. The *Parentage and Maintenance Act* took effect on January 1, 1991. It provides a summary proceeding for the support of children, whether born within or outside marriage. The new Act replaces the "affiliation proceedings" formerly located in Part 2 of the *Maintenance and Recovery Act*. As in its predecessor legislation, the procedure in the new Act is quasi-criminal in nature. Other statutes have been amended in ways that further affect the detail of our recommendations. One example is the repeal, in 1985, of section 10 of the *Change of Name Act*.

Fourth, social attitudes have changed, making adverse discrimination against children less acceptable today than in previous years. These changing attitudes have resulted in revised thinking about matters having to do with the status of children and its incidents. One such change in recent years has been the disconnection from guardianship of the power of the court to grant a parent or other adult access to a child. Propelled by changing societal attitudes, courts are recognizing that some fathers of children born outside marriage play a beneficial role in the child's life. As a result, they are paying increasing attention to the standing, rights and obligations of fathers of children born outside marriage.

(4) Law Elsewhere in Canada

At the present time seven Canadian jurisdictions -- four more than in 1985 -- have removed the distinction in law between legitimate and illegitimate children. Those jurisdictions are British Columbia, Manitoba, New Brunswick, the Northwest Territories, Ontario, Prince Edward Island and the Yukon. In addition, in 1982 the Uniform Law Conference of Canada adopted a *Uniform Child Status Act* which it proposes for consideration by provincial and territorial governments. In 1990, that body adopted extensive amendments to the *Uniform Child Status Act* in order to provide for the parentage of children born as a result of the new reproductive technologies.

B. Recommendation for the Enactment of a *Status of Children Act*

Report No. 20 set out a draft *Status of Children Act*. *Report No. 45* updated the text and recommendations contained in *Report No. 20*, but did not reproduce the draft Act. In this Report, we have chosen to update and publish the draft Act and to convert the text of the two previous reports into annotated comments on the sections of the Act.

In consequence, in this report we make only one recommendation, and that is for the enactment of the *Status of Children Act* that we propose.

Although the *Status of Children Act* is drafted as a separate statute, this is not essential. What is important is that all of the provisions be situated in one location. An option would be to locate them in a separate Part of an existing statute of general application. If the latter choice is made, we think that the *Domestic Relations Act* would be the appropriate statute.

C. Comprehensive Approach to Reform

Our approach to reform has been both comprehensive and detailed. In our view, anything less would be unsatisfactory.

To choose simply to abolish the status of illegitimacy, but not to grapple with the ramifications of abolition, would be unfortunate because a number of adverse

consequences are likely to follow. Simple abolition of the status of illegitimacy, without more, would:

(a) open up argument that section 47 of the *Domestic Relations Act* confers guardianship upon every father of a child born within or outside marriage, whatever the circumstances through which he became the father, however disinterested he is in the child, and however unsuitable he is to be making decisions in the child's best interests;

(b) obfuscate the issue of legal entitlement where a claim by one person to the property of another now depends upon whether a third person is legitimate or illegitimate;

(c) leave it unclear whether the rule of interpretation of a will that "child" means a legitimate child is abrogated;

(d) attract litigation on the meaning of the words "lawful lineal descendants" in section 1(b) of the *Intestate Succession Act*;

(e) make it difficult to satisfy statutory and common law requirements that fathers be notified of matters affecting their child, or that their consent be obtained;

(f) preserve the necessity to prove parentage by evidence in every situation where the issue arises, instead of settling it for all purposes in one proceeding.

To choose to make minor amendments, here and there, to incidents of the status would likely lead to unwanted effects in the bits and pieces tinkered with well as in those areas left untouched. Piecemeal reform lends itself to ambiguous, if not inequitable, results.

Notwithstanding the comprehensive approach that we have taken to reform of the law relating to the status of children, in recommending the content of the *Status of Children Act* and consequential amendments to other statutes providing for incidents of the parent and child relationship, we have limited our project to the discrete subject of reform of the law relating to the status of children. Our approach has been to interfere as little as possible, beyond what is necessary to confer equal status, with the laws setting out the incidents of that status. We have resisted the

temptation to move further into the tangled thicket of family and children's law -- areas of law that cry out for rationalization and consolidation.

D. Key Elements

(1) Equal Status of All Children

As stated, the primary goal of the reform recommended in the proposed *Status of Children Act* is to put an end to discrimination, in law, against children born outside marriage by conferring equal status on all children in relation to their parents, and through their parents to other kindred.

Section 5(1) of the Act provides that the principle of equal status applies for all purposes of the law of Alberta. Under section 2, the Act applies both retrospectively and prospectively, with the exception that vested rights are not disturbed. The rule of construction of documents that assumes legitimate relationship is abolished by section 3. The existing distinction made in law between legitimate and illegitimate children is abolished in section 5(3).

(2) Legal Incidents of the Parent and Child Relationship

The legal incidents of the parent and child relationship fall into two areas. The first area is the legal recognition accorded to the personal relationship between the parent and a minor child. The second area is the rights and obligations conferred in law in relation to maintenance and succession to property. With the exception of parental guardianship and the various incidents that flow from it, and an existing anomaly with respect to maintenance (discussed in E.(2)), all rights and obligations of a child born outside marriage, of a parent, or of any other related person would be determined as if the child were born within marriage.

(a) Personal relationship between parent and a minor child

The guardianship of a minor child is the most important of the rights and obligations that can be entrusted to a parent. That is because a minor child is necessarily dependent and must look to adults for the fulfilment of the child's material and emotional needs. Guardianship is a responsibility: the rights and obligations associated with it exist for the benefit of the child, not the parent.

Guardianship is defined in section 1(f) of the Act. It "includes the rights of control and custody of the child, the right to make decisions relating to the care and upbringing of the child and the right to exercise all powers conferred by law upon a parent who is a guardian of the child". Among such powers are: the right to act for the child and to appear in court in the name of the child (*Domestic Relations Act*, s. 46(a) and (b)); the right to manage the child's property (*Domestic Relations Act*, s. 46(c)); the right to make decisions about education (*Domestic Relations Act*, s. 46(d)); the right to direct the religion in which the child should be brought up (*Domestic Relations Act*, s. 60); the right of access to the child (*Domestic Relations Act*, s. 56); the right to decide the child's name (*Change of Name Act*, sections 4.1, 5, 6, 7, 7.1 and 11); the right to grant or refuse consent in matters concerning the child, *e.g.*, adoption or marriage; and the right to notice of matters affecting the child, *e.g.* proceedings to establish parentage, or proceedings for a temporary or permanent guardianship order, or for a private guardianship order, under the *Child Welfare Act*.

Section 7 specifies the parents who are guardians in law automatically from the birth of the child. The parents who are recognized as guardians are those persons from whom an affection for the child is assumed to flow naturally, and who, because of the nature of their relationship to each other, are thought to be most likely to exercise the rights and powers of guardianship in the best interests of the child.

The mother is a guardian in all cases -- the indisputable bond with the woman who bears the child makes her the obvious first choice of person to carry that responsibility in most cases.

The father is a guardian if he satisfies certain presumptions of parentage. By analogy to the existing law which confers guardianship on the man who was married to the mother at the time of the conception or birth of the child or between these times, section 7 confers guardianship on a father who is married to the mother, has cohabited with her throughout the year preceding the birth of the child, or who marries the mother after the child's birth and acknowledges that he is the father. The result of these presumptions is that, under the Act, more minor children than at present will benefit from the guardianship of both parents immediately from birth or from such time thereafter as parentage is established. As is readily apparent, these presumptions are based on facts from which it can be surmised that the father and mother enjoy or have enjoyed a good personal relationship and that it is therefore in the best interests of the child that this man should be a guardian. The principle of requiring a close personal relationship with the mother would exclude

from guardianship a father whom it cannot reasonably be assumed will be interested in the child and likely to act in the child's best interests, for example, a father by rape, incest or casual affair with the mother.

The automatic provision of the law for guardianship ensures that someone will be responsible for the care and upbringing of the child from birth and that the interests of the child will thereby be met immediately. In making the parents of a child guardians automatically from birth, section 7 reflects conventional cultural, social and psychological views that hold that it is generally better for children to be brought up by their birth parents than by others in their stead. It also reflects the conventional wisdom that it is ordinarily in the best interests of a child to be raised by two parents -- a mother and a father.

The guardianship stipulated in section 7 is subject to the exception of an order of a court of competent jurisdiction otherwise. Subsections 9(3) and (7) permit parents who are not guardians under section 7 to apply to the court for guardianship upon or after the grant of a declaration of parentage. The guardianship order may be made where the parent is willing and able to assume the responsibility of a guardian towards the child and the appointment is in the best interests of the child. The court has discretion to mould the authority of the parent as guardian to suit the circumstances by excepting one or more of the usual incidents of guardianship.

Jurisdiction to order guardianship also exists in the *Domestic Relations Act* and the *Child Welfare Act*, although section 22(b) will repeal section 47 of the *Domestic Relations Act* which now makes the mother the sole guardian of a child born outside marriage.

(b) Maintenance and succession to property

Under the Act, the financial rights and obligations of parents and children to each other and, through them, to other kindred, will be the same regardless of the birth of the child within or outside marriage. These financial rights and obligations include the right to the payment of maintenance and the right to succeed to property in the estate of a deceased relative. Equality is achieved by means of section 5, which mandates the equality of children for all purposes of the law of Alberta, and by consequential amendments to the existing statutes that provide for financial rights and obligations. Those statutes include the *Maintenance Order Act*, the *Domestic Relations Act*, the *Family Relief Act* and the *Intestate Succession Act*. Their content is described more fully in the annotation on section 5.

(3) Determination of Parentage

Because significant legal consequences flow from the fact of parentage, it is essential that a method be provided to establish it. Section 8 follows the precedent of the existing law by providing for the identification of the parents of a child by presumption. The presumptions of parentage operate unless and until they are disproved. Because the presumptions may be incorrect, do not cover all situations, and sometimes will conflict, section 9 provides a mechanism for the determination of parentage in court on a balance of probabilities. Where parentage is found, the outcome will be a declaration of parentage.

(a) Presumptions of parentage

Ordinarily, the mother will be the person identified, in the definition in section 1(h)(i) or (ii), as the woman who gave birth to the child or is pregnant and expecting to give birth to a child not yet born. Therefore, no presumption is needed.

The parentage of the father will be less readily apparent. Section 8 provides for the identification of the father of a child by one or another of five presumptions. The presumptions set up rights and obligations which exist mainly for the benefit of the child.

The first three presumptions are the presumptions that form the foundation for guardianship from birth, in section 7: marriage to the mother at the time of the conception or birth of the child; cohabitation with the mother throughout the year before the child's birth; and marriage to the mother after the birth of the child coupled with the husband's acknowledgment that he is the father of the child. The other two presumptions are: registration of a man as father under the *Vital Statistics Act*, s. 3, at the joint request of himself and the mother; and acknowledgment by both a man and the mother that the man is the father of the child. The latter two presumptions, as well as the former three, give rise to the financial rights and obligations that flow from the relationship between parent and child; they also may entitle a parent, irrespective of guardianship, to receive notice of, or give consent to, certain matters affecting the child.

The facts may support a presumption that more than one man is the father of a child. In this situation, both presumptions will stand until a court makes a decision between them. We think that most situations will sort themselves out and that allowing the presumptions of parentage to stand will help family life to go on

as much as possible without litigation in court over parentage. If the question of paternity is raised in proceedings for a declaration of parentage under section 9 and there are conflicting presumptions, the court can make a decision on the balance of probabilities.

No presumption is provided where a court of competent jurisdiction has found a man or woman to be the father or mother of a child in another proceeding. That is because section 4 requires a question of parentage that arises in any other civil proceeding to be decided as if it had been raised in an application for a declaration of parentage under this Act. Formal proceedings of this kind are a desirable protection for everyone concerned. A decision about parentage should be made in proceedings to which the child and any alleged parent, if living, are parties and in which the far reaching consequences of the determination are understood.

(b) Declaration of parentage

Where it is necessary to determine parentage, section 9 provides a proceeding to obtain a court declaration of parentage. The proceeding makes it possible for a parent to establish parentage where the facts do not support a presumption of parentage under section 8, or where two presumptions of fact conflict. It also makes it possible for a court to declare the parentage -- whether of the mother or the father -- of a child who is the product of assisted human reproduction, a growing possibility in this era of rapid technological advancement.

The declaration takes effect for all purposes. In our view, this is preferable to requiring parentage to be proved by evidence whenever the issue arises in a proceeding in which a legal incident of the parent and child relationship is in issue -- a proceeding in which notice may be limited to the parties to the matter before the court and in which full trial process including interlocutory procedures may not be available.

An application for a declaration of parentage may be commenced by originating notice brought in either the Court of Queen's Bench or the Provincial Court, as provided by the definition of "Court" in section 1(b). The application may be made by a person claiming to be the father, mother or child or another person or the father of an unborn child. Section 10 requires notice of the proceeding to be given to those persons who stand to be affected by the determination; the persons who receive notice may be heard on the application. Where necessary, a full trial of the issue of parentage could be ordered. Section 17 provides for the regulation

of the practice and procedure in the Provincial Court by analogy to the *Alberta Rules of Court* and the procedures followed in the Court of Queen's Bench, so that the concurrent jurisdiction of these courts to determine parentage and grant a declaration will be exercised in the same manner.

Because the declaration establishes parentage for all purposes, and because mistakes can be made, the declaration may be set aside later, under section 11, in the event that doubt is later cast on the parentage supported by the declaration. Unless and until it is set aside, a declaration operates as the governing presumption of parentage under section 8(2) and (3).

No limitation period is placed on the establishment of parentage because, strictly speaking, a declaration of status has no creative effect; it merely recognizes and declares the personal status that exists. Although rights may be affected by it, the declaration itself does not have any remedial effect.

Where a remedy is sought with respect to one of the incidents of the parent and child relationship, the limitation period relevant to that incident should apply. In our *Report No. 55* on *Limitations* we expressed our preference for applying the provisions in the general limitations statute to all claims. We favoured this position over the proliferation, in other statutes, of specific limitations periods that are different from the general limitation periods which we recommended. Under our recommendations, the general limitation periods applicable to claims for a remedy would be suspended during the child's minority. Otherwise, they would give the defendant immunity from liability unless the claim is made within two years after discovery of the facts warranting a claim or 15 years after the claim arose, whichever period expires first.

(c) Registration of parentage

Parents have the right, independent of guardianship in some cases, to be notified of certain matters relating to their child. It is not always easy for a person who is required to give notice or obtain consent to know of the existence of a non-custodial parent. The Act, in section 12, therefore requires the Director of Vital Statistics to establish a register of parentage in which persons claiming to be parents can register voluntarily. Registration will help ensure that parents receive notice or are contacted for consent where they are entitled to it. Similarly, it will aid those persons who are under a duty to give notice or obtain consent to locate parents who should be notified or whose consent should be obtained.

(4) Consequential Amendments to Other Statutes

As stated previously, our guiding policy has been to make only those amendments that are necessary to give all children equal status, regardless of their birth within or outside marriage. The consequential amendments to other statutes do not otherwise reform the general law relating to guardianship, custody or access; the duty of maintenance that family members owe to one another; or succession to the property of a deceased person.

E. Points to Underscore

(1) Provincial Court Jurisdiction

(a) Determination of parentage

A review of recent case law discloses that the issue of parentage is frequently raised on custody applications and in child welfare cases brought before the Family Division of the Provincial Court. Answers to our inquiries indicate that many of the persons involved in these proceedings are unlikely to have the resources to bring the issue to the Court of Queen's Bench. For these reasons, it makes sense, in our view, to confer jurisdiction to determine parentage on the Provincial Court, as provided by section 9 read with section 1(b).

In the absence of Provincial Court jurisdiction, the judicial resolution of the issue of parentage would be restricted to children whose parents could afford to pay the costs associated with proceedings in the Court of Queen's Bench. Functionally, the result would be a legal system that discriminated against children on the basis of their parent's income level and this would not be acceptable.

We see awkwardness in the approach of conferring concurrent jurisdiction on the Court of Queen's Bench and the Provincial Court, and remind the government that the adoption of the recommendations for a Unified Family Court that we made in 1978, in *Report No. 25 - Family Law Administration: the Unified Family Court*, would alleviate the difficulty.

(b) Statutory jurisdiction to grant a declaration

Having made the case for conferring jurisdiction to grant a declaration of parentage on the Provincial Court, we express one reservation about that

recommendation. The reservation is based on the possibility that section 96 of the British North America Act may prevent provinces from conferring jurisdiction by statute to grant declarations. It is clear, as a matter of law, that the Provincial Court does not have inherent jurisdiction to grant a declaration.

We have not thoroughly researched the limits of a statutory jurisdiction to grant a declaration issue, and flag the issue here for the attention of the government's constitutional experts. However, we think it likely that provincial legislatures can confer such jurisdiction on provincially-appointed judges. We have three reasons for so thinking. First, the judgments of the Supreme Court of Canada since the *Adoption Reference* in 1938, [1938] S.C.R. 398, [1938] 3 D.L.R. 497, including the reference, in 1982, in *Re B.C. Family Relations Act, 1978; Attorney General of Ontario et al. v. Attorney General of Canada* [1982] S.C.R. 62, [1982] 3 W.W.R. 1, 40 N.R. 206 go a considerable distance in support of the constitutionality of the jurisdiction of provincial courts over family matters. Second, several judgments have supported the jurisdiction of provincial courts to determine parentage where the finding is necessary to a decision in a matter over which the court has jurisdiction (see *e.g.*, *Sayer v. Rollin*, (1980), 16 R.F.L. (2d) 289 (Ont. C.A.)). Third, our recommendation is for a declaration that takes effect as a presumption; it can be set aside later by the Provincial Court that made it, or by the Court of Queen's Bench, if its correctness is challenged.

(2) Maintenance Orders

The result of our recommendations is that, in most situations, a single provision pertaining to an incident of the parent and child relationship will apply to children born within or outside marriage. However, an anomaly will remain in the case of maintenance.

The anomaly is explained as follows. By virtue of Part 4 of the *Domestic Relations Act*, the Provincial Court can make and enforce orders for maintenance for children conceived or born within marriage. However, the Provincial Court does not have jurisdiction to order or enforce maintenance for a child born outside marriage. Orders for maintenance for children born outside marriage must be obtained under the *Parentage and Maintenance Act* in proceedings before the Court of Queen's Bench. It comes as a surprise, and is a source of frustration, to the parties appearing in custody proceedings before the Provincial Court to learn that the issue of maintenance must be heard by the Court of Queen's Bench.

The *Parentage and Maintenance Act* is anomalous in Canada. It is based on legislation historically punitive in nature, intended to make fathers pay maintenance for their children born outside marriage and expenses related to the pregnancy of the mother and the birth of the child. The Act continues to be an anomalous piece of legislation notwithstanding the facelift the provisions received in their recent enactment in language that is basically gender neutral. The predominant purpose of this separate legislation continues to be to provide a summary procedure by which to affiliate fathers with their children born outside marriage for purposes of maintenance. That the main purpose of this legislation is to make someone pay is evident from section 15(2) which allows the court to make an order declaring each of the persons who might be a parent to be a parent for the purposes of the Act. That it is the father who is expected to pay can fairly be assumed from this fact and from the fact that, under section 16(2)(a), the order can include "reasonable expenses for the maintenance of the mother" for a period before, at and after the birth of the child.

Alberta is the only province whose general child support legislation totally excludes children born outside marriage. In Alberta, the general legislation is the *Domestic Relations Act*. The Institute currently has the *Domestic Relations Act* under review. We anticipate that our recommendations within the context of that Act will include recommendations for a new procedure for obtaining maintenance in the Provincial Court as well as in the Court of Queen's Bench and that the procedure will be available to all children, whether born within or outside marriage. We also anticipate that our recommendations will call for the repeal of the *Parentage and Maintenance Act*, relegating this obsolescent approach to maintenance for children born outside marriage to its appropriate place in the annals of Alberta's history.

RECOMMENDATION:

We recommend the enactment of the *Status of Children Act* set out in Part II of this report.

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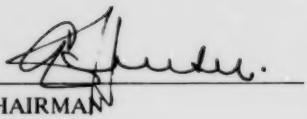
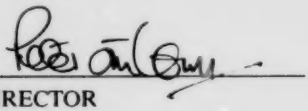


CHAIRMAN



DIRECTOR

March 1991

PART II - PROPOSED *STATUS OF CHILDREN ACT*

[Section 1 - Definitions]

Definitions

1 In this Act, unless the context otherwise requires

(a) "child" includes a person who has attained the age of majority;

(b) "Court" means the Court of Queen's Bench or the Provincial Court;

(c) "father" means a man who is

(i) entitled to a legal presumption that he is the father of a child under section 8, or

(ii) declared to be the father of a child in a declaration of parentage granted under section 9;

(d) "director of child welfare" means a person designated by the Minister as a director for the purposes of the *Child Welfare Act*;

(e) "guardianship" means guardianship of the person of a minor child and includes the rights of control and custody of the child, the right to make decisions relating to the care and upbringing of the child and the right to exercise all powers conferred by law upon a parent who is a guardian of a child;

(f) "guardian" means a person with guardianship;

(g) "marriage" includes a void or voidable marriage and "married" has a corresponding meaning;

(h) "mother" means the woman who

(i) gave birth to the child,

(ii) is pregnant and expecting to give birth to a child, or

(iii) is declared to be the mother in a subsisting declaration of parentage granted under section 9;

(i) "parent" means a mother or a father.

Part 1 - Application of Act

[Section 2 - Application of this Act]

Application of this Act

2(1) Subject to subsection (2), this Act applies to any person born, and any instrument, Act or regulation executed, before as well as after its commencement.

(2) This Act does not affect rights vested before its commencement.

[Section 3 - Rule of Construction]

Rule of Construction

3 The rule of construction whereby in a will, deed or other instrument or enactment words of relationship signify only legitimate relationship in the absence of a contrary intention is abolished.

[Section 4 - Parentage To Be Determined Under this Act]

Parentage to be determined under this Act

4(1) Notwithstanding any other Act, if a question with respect to the parentage of a child arises in any other civil proceeding, the question shall be decided as if it had been raised in an application for a declaration of parentage under this Act.

(2) Subsection (1) does not apply to a proceeding to obtain maintenance for a child under the *Parentage and Maintenance Act*.

Part 2 - Status and Rights and Obligations of Children and Parents

[Section 5 - Rule of Parentage]

Rule of Parentage

5(1) Subject to section 6, a person is the child of his or her mother and father for all purposes of the law of Alberta, and the status and the rights and obligations of

(a) a child with respect to his or her mother or father,

(b) a father or mother with respect to his or her child, and

(c) all other kindred through the father or mother with respect to a child

exist independently of whether the child is born within or outside marriage.

(2) Subsection (1) does not affect the status, rights or obligations of the parents as between themselves.

(3) Any distinction at common law based on the birth of a child within or outside marriage is abolished.

[Section 6 - Exception for Adoption]

Exception for Adoption

6 Where an adoption order has been made, section 65 of the *Child Welfare Act* applies and the adopted child is the child of the adopting parent as if the parent were a parent under this Act.

[Section 7 - Guardianship]

Guardianship

7 Unless a court of competent jurisdiction otherwise orders,

(a) the mother is a guardian of her minor child; and

(b) the father is a guardian of his minor child if

(i) at the time of the conception or birth of the child or between those times he is married to the child's mother,

(ii) he cohabits with the child's mother throughout the year preceding the child's birth, or

(iii) he marries the mother after the birth of the child and acknowledges that he is the father of the child.

Part 3 - Establishing Parentage

[Section 8 - Presumptions of Parentage]

Presumptions of parentage

8(1) A legal presumption that a man is the father of a child exists if

(a) at the time of the conception or birth of the child or between those times he is married to the child's mother,

(b) he cohabits with the child's mother throughout the year preceding the child's birth,

(c) he marries the mother after the birth of the child and acknowledges that he is the father of the child,

(d) he is registered as the father of the child under the *Vital Statistics Act* or under a similar provision of the corresponding statute of another jurisdiction at the joint request of himself and the child's mother, or

(e) both he and the mother of the child acknowledge that he is the father.

(2) A man or woman is presumed to be the parent of a child if he or she is named as a parent in a subsisting declaration of parentage granted under section 9.

(3) The granting of a declaration of parentage under section 9 with or without guardianship terminates any presumption under subsection (1).

[Section 9 - Declaration of Parentage]

Declaration of parentage

9(1) A person claiming to be the father, mother or child of another person or the father of an unborn child may apply by originating notice to the Court for a declaration of parentage.

(2) The Court shall grant a declaration of parentage upon being satisfied, on a balance of probabilities, that the alleged father or mother is the father or mother of the child or unborn child.

(3) If a person who claims to be the father or mother of a minor or unborn child under subsection (1) seeks to be named a guardian, the Court may grant the declaration of parentage

(a) with guardianship, or

(b) with access but not guardianship.

(4) The Court shall not grant a declaration of parentage with guardianship or access unless it is satisfied that the order is in the best interests of the child and, in the case of guardianship, that the applicant is able and willing to assume the responsibility of a guardian towards the child.

(5) In a declaration of parentage with guardianship the Court

(a) may exclude any of the rights of guardianship, and

(b) shall provide for the surname by which the child is to be known.

(6) A guardian named in a declaration of parentage with guardianship is a guardian in addition to any other guardian of the child.

(7) At any time after it has made a declaration of parentage, the Court, upon application by originating notice made by a person described in subsection (1) and upon being satisfied that it is in the best interests of the minor or unborn child so to do, may

(a) revoke a right of guardianship or access granted by order,

(b) confer guardianship or access in accordance with subsections (3) and (4) if the declaration of parentage did not do so,

(c) vary the declaration as to rights of guardianship granted or excluded by it.

(8) An application under this section may be brought on behalf of the child by any person acting on the child's behalf.

(9) The Court has jurisdiction under this section if the child or an alleged parent against whom an application is brought is resident in Alberta.

[Section 10 - Notice of Application]

Notice of application

10(1) Unless the Court otherwise directs, notice of an application for a declaration of parentage shall be given to

(a) the person claimed to be a child, where the person is 12 years of age or older,

(b) any person named by law to be served on behalf of the person claimed to be a child,

(c) the guardian and the trustee of a dependent adult, or in the absence of a guardian or trustee, the Public Guardian or the Public Trustee,

(d) any other person claiming to be a parent, and

(e) a director of child welfare in a case under subsection (3).

(2) Upon the application the Court shall

(a) consider whether or not any other person should receive notice; and

(b) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

(3) Where the father or mother is not a guardian of his or her minor child under section 7 and applies to be named a guardian under section 9(3) or (7), the Court may require the applicant to provide it with a report in the prescribed form prepared by a qualified person respecting

(a) the suitability of the applicant as a guardian,

(b) the ability and willingness of the applicant to assume the responsibility of a guardian towards the child, and

(c) whether it is in the best interests of the child that the applicant be appointed as a guardian of the child.

(4) If the applicant is the subject of a permanent guardianship agreement or order under the *Child Welfare Act*, the report required under subsection (3) shall be prepared by a director of child welfare.

(5) If the child is not the subject of a permanent guardianship agreement or order, the applicant shall serve a copy of the report required under subsection (3) on a director of child welfare not less than 2 days before the report is provided to the Court.

(6) On being served with a notice of an application for a guardianship order, a director of child welfare may conduct an investigation with respect to the proposed guardianship and may make representations to the Court at the time the application is heard.

(7) If a director of child welfare intends to make representations to the Court under subsection (6), he shall notify the Court and the applicant not less than 2 days before the date of the hearing of the application.

[Section 11 - Duration of Declaration]

Duration of declaration

11(1) A declaration of parentage remains in force until it is set aside under this section.

(2) An application to set aside a declaration of parentage may be made, with the leave of the Court,

(a) to the Court that granted the declaration, or

(b) to the Court of Queen's Bench.

(3) Notice of the application shall be given in the manner prescribed by section 10(1) and (2).

(4) The Court hearing the application may confirm the declaration of parentage or set it aside.

(5) The setting aside of a declaration of parentage does not affect rights which vested while the declaration was in force.

[Section 12 - Registration for Notice Purposes]

Registration for Notice Purposes

12(1) A person claiming to be the parent of a child may file with the Director of Vital Statistics:

(a) a declaration of parentage, or an affidavit of parentage in the prescribed form attesting to the facts on which the claim is based;

(b) if not otherwise provided, the name, date of birth, place of birth and sex of the child and, if known, the birth registration of the child and the name of the other parent; and

(c) the parent's address for service within the province which the parent may change from time to time by notice in writing filed with the Director of Vital Statistics.

(2) The Director of Vital Statistics shall

(a) maintain a register of declarations of parentage and affidavits filed under subsection (1) and of fathers registered at the request jointly with the mother under section 3(8) of the *Vital Statistics Act*; and

(b) provide the name and address of a person claiming to be a parent of the child to

(i) any party to a proceeding or proposed proceeding involving the child,

(ii) any person requiring the consent of the parent to a matter affecting the child.

(3) Unless the court having jurisdiction over the subject matter of a proceeding otherwise orders, service of a notice by registered mail addressed to the last address for service filed with the Director of Vital Statistics is good and sufficient service.

(4) Subject to subsection (2), information filed under this section shall be treated as confidential and it shall not be published, released or disclosed in any manner that would be detrimental to the personal interest, reputation or privacy of the person claiming to be the parent, the child, or any other person.

(5) If, on an application for a declaration of parentage under this Act, the Court makes a finding that a person filing an affidavit under subsection (1) is not the parent of the child, it may direct that the affidavit be removed from the register and the affidavit thenceforth shall be deemed not to have been filed.

Part 4 - Evidence of Parentage

[Section 13 - Court Orders Determining Parentage]

Court Orders Determining Parentage

13 A court in Alberta before which the parentage of a child is in issue in a civil proceeding

(a) shall have regard to any subsisting presumption of parentage under section 8, and

(b) shall admit as evidence an order or judgment of any court of competent jurisdiction which expressly or by implication determines the parentage of the child.

[Section 14 - Competence and Compellability]

Competence and Compellability

14 Notwithstanding any other Act, in an application for a declaration of parentage under this Act a married person is a competent and compellable witness to testify as to the parentage of the child in respect of whom the application is made.

[Section 15 - Blood and Genetic Tests]

Blood and genetic tests

15(1) On the request of a party to an application for a declaration of parentage or upon its own motion in civil proceedings in which the parentage of a child is in issue, the Court may make an order granting leave to obtain blood tests or any other tests that the Court considers appropriate from any person named in the order and to submit the results in evidence.

(2) An order under subsection (1) may be made subject to any terms and conditions the Court considers proper.

(3) No test shall be performed on a person without his consent.

(4) If a person named in an order under subsection (1) is not capable of giving a consent because of age or incapacity, the consent may be given by the guardian of the person.

(5) If a person named in an order under subsection (1) or the person's guardian, as the case may be, refuses to consent to a test referred to in the order, the Court may draw any inference it considers appropriate and if the person is a party may grant such

relief as is claimed against him and refuse such relief as is claimed by him, but the dismissal of proceedings by reason of the refusal of an alleged parent shall be without prejudice to future proceedings on behalf of the child.

[Section 16 - Admission of Parentage]

Admission of parentage

16 An admission of parentage is admissible in evidence in civil proceedings without proof that it is free and voluntary.

Part 5 - Other Matters

[Section 17 - *Alberta Rules of Court* Apply in Provincial Court Proceedings]

Alberta Rules of Court apply in Provincial Court proceedings

17(1) In any matter not provided for in this Act or the regulations under this Act, the practice and procedure in the Provincial Court, as far as may be, shall be regulated by analogy to the *Alberta Rules of Court* and the procedures followed in the Court of Queen's Bench.

(2) The Provincial Court may give directions on practice and procedure.

(3) The Provincial Court on application may

(a) vary a rule of practice or procedure,

(b) refuse to apply a rule of practice or procedure, or

(c) direct that some other procedure be followed.

[Section 18 - Regulations]

Regulations

18 The Lieutenant Governor in Council may make regulations

(a) prescribing the forms to be used under this Act;

(b) defining a "qualified person" for the purposes of section 10(3); and

(c) prescribing the rules to be followed in a proceeding before the Provincial Court under this Act.

Consequential Amendments

[Section 19 - Amendment of *Alberta Evidence Act*]

Amendment of *Alberta Evidence Act*

19 *The Alberta Evidence Act is amended by adding the following after section 7(2):*

(3) Subsection (1) does not apply to the determination in a civil proceeding of any issue involving the parentage of a child, but evidence given on any such issue tending to show the commission of adultery is inadmissible in any other civil proceeding.

[Section 20 - Amendment of *Change of Name Act*]

Amendment of *Change of Name Act*

20 *The Change of Name Act is amended*

(a) by adding after section 11(1):

(1.1) If the other parent is a guardian of the child, the consent of that parent is required to change a given name or the surname of a child on an application made under subsection (2), (3), (4), (5) or (6).

(b) by striking "out of wedlock" *wherever the words appear in section 11(1), (2), (3), (4), (5) or (6) and substituting* "outside marriage".

(c) in section 11(6) by striking out "putative" *wherever it occurs.*

[Section 21 - Amendment of *Child Welfare Act*]

Amendment of *Child Welfare Act*

21 *The Child Welfare Act is amended:*

(a) by repealing section 1(1)(c) and substituting

(c) "biological father" means the man who

(i) is entitled to a legal presumption that he is the father of a child under section 8 of the *Status of Children Act*,

(ii) is declared to be the father in a declaration of parentage granted under section 9 of the *Status of Children Act*, or

(iii) satisfies the Minister that he is the biological father of the child.

(b) in section 1(1)(k),

(i) by repealing subclause (i) and substituting

(i) a person who is or is appointed a guardian of the child under the *Status of Children Act*,

(ii) by renumbering subclause (ii) as subclause (iii) and adding the following after subclause (i)

(ii) a person who is appointed a guardian of the child under Part 7 of the *Domestic Relations Act*, or

(c) in section 36

(i) by striking out "If a child born out of wedlock" *and substituting* "Unless a declaration or affidavit of parentage has been filed under section 12 of the *Status of Children Act*, if a child born outside marriage", *and*

(ii) by striking "out of wedlock" *and substituting* "outside marriage".

(d) in section 65(1), by striking "in lawful wedlock" *and substituting* "in the circumstances described in section 7 of the *Status of Children Act*".

(e) by renumbering section 77 as section 77.1 and adding:

77 Whenever notice is required to be given or consent obtained in any proceedings before the Court under this Act, the Court shall

(a) consider whether or not notice should be given to, or consent obtained from, any person who

(i) is entitled to a legal presumption of parentage under section 8 of the *Status of Children Act*,

(ii) has filed a declaration or affidavit of parentage under section 12 of the *Status of Children Act*, or

(iii) is registered under 3 of the *Vital Statistics Act* as the father at the joint request of himself and the child's mother, or

any other person, and

(b) direct that notice be given to any person in clause (a) who in the opinion of the Court should have an opportunity to be heard.

[Section 22 - Amendment of *Criminal Injuries Compensation Act*]

Amendment of *Criminal Injuries Compensation Act*

22 *The Criminal Injuries Compensation Act is amended in section 1(1)(b) by striking* "an illegitimate child and".

[Section 23 - Amendment of *Domestic Relations Act*]

Amendment of *Domestic Relations Act*

23 *The Domestic Relations Act is amended as follows:*

(a) in section 27(7) by striking out "legitimate children of" *and substituting* "children born to";

(b) by repealing section 47;

(c) in section 48, by renumbering subsection (1) and subsection (1.1) and adding the following

(1) In this section, "parent" means a parent who is a guardian of the child.

(d) in section 55(1)

(i) by adding "each of whom is a guardian" *after* "parent",

(ii) by striking "the children of the marriage" *and substituting* "the children of whom they are the parents";

(e) *by adding the following after section 56(5):*

(6) This section applies whether the child is born within or outside marriage but does not empower the court to grant custody of the child to a parent who is not a guardian of the child.

(f) *by adding the following after section 57:*

57.1 Upon any application under this Part which affects the guardianship or custody of or the right of access to a child the court shall

(a) consider whether or not notice should be given to any person who

(i) is entitled to a legal presumption of parentage parent under section 8 of the *Status of Children Act*,

(ii) has filed a declaration or affidavit of parentage under section 12 of the *Status of Children Act*, or

(iii) is registered under section 3 of the *Vital Statistics Act* as the father at the joint request of himself and the child's mother, or

any other person, and

(b) direct that notice be given to any person in clause (a) who in the opinion of the court should have an opportunity to be heard.

[Section 24 - Amendment of *Family Relief Act*]

Amendment of *Family Relief Act*

24 *The Family Relief Act is amended by repealing section 1(b) and substituting the following:*

(b) "child" includes

(i) a child of a deceased born after the death of the deceased; and

(ii) a child born within or outside marriage.

[Section 25 - Amendment of *Fatal Accidents Act*]

Amendment of *Fatal Accidents Act*

25 *The Fatal Accidents Act is amended*

(a) in section 1(a), by striking out "stepdaughter and illegitimate child" *and substituting* "and stepdaughter";

(b) in section 8(1)(a), by striking out "illegitimate or illegitimate" *and substituting* "born within or outside marriage".

[Section 26 - Amendment of *Intestate Succession Act*]

Amendment of *Intestate Succession Act*

26 *The Intestate Succession Act is amended:*

(a) in section 1(b) by striking out "lawful";

(b) by repealing sections 13 and 14.

[Section 27 - Amendment of *Maintenance Order Act*]

Amendment of *Maintenance Order Act*

27 *The Maintenance Order Act is amended as follows:*

(a) in section 1(a) by striking out ", but does not include an illegitimate child";

(b) by adding the following after section 1:

1.1(1) This Act shall be read in conjunction with the *Status of Children Act*.

(2) Notwithstanding anything contained in this Act, a child is not obliged to provide maintenance for his father or paternal grandparents unless the father was, during the child's minority, a guardian of the child.

[Section 28 - Amendment of the *Perpetuities Act*]

Amendment of *Perpetuities Act*

28 *The Perpetuities Act is amended in section 9(4) by striking out* "or legitimation".

[Section 29 - Amendment of *Provincial Court Act*]

Amendment of *Provincial Court Act*

29 *The Provincial Court Act is amended*

(a) by adding the following after section 32(1):

(1.1) Subsection 1 applies whether the child is born within or outside marriage but does not empower the Court to grant custody of the child to a parent who is not a guardian of the child.

(b) by adding the following after section 32(9):

(10) Unless the Court otherwise orders, notice of an application shall be given to:

(a) a person who is named as a parent of the child in a declaration or affidavit of parentage filed with the Director of Vital Statistics under section 12 of the *Status of Children Act*, and

(b) a man who is registered under section 3 of the *Vital Statistics Act* as the father of the child at the joint request of himself and the mother.

(11) Upon the application the Court shall

(i) consider whether or not any other person should receive notice; and

(ii) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

[Section 30 - Amendment of *School Act*]

Amendment of *School Act*

30 *The School Act is amended by adding the following after section 1(1)(a):*

(a.1) "biological father" means a man who is

(i) a guardian of the child under section 7 of the *Status of Children Act*, or

(ii) declared to be the father in a declaration of parentage granted under section 9 of the *Status of Children Act* and appointed a guardian of the child.

(a.2) "biological mother" means the woman who

(i) gave birth to the child, or

(ii) is declared to be the mother in a declaration of parentage granted under section 9 of the *Status of Children Act* and appointed a guardian of the child.

[Section 31 - Amendment of *Vital Statistics Act*]

Amendment of *Vital Statistics Act*

31 *The Vital Statistics Act is amended:*

(a) by repealing section 3(3) and substituting:

(3) A father who is not a guardian of the child is not required to comply with subsection (2).

(b) by adding the following after section 3(13):

(14) Upon receipt of a declaration of parentage with guardianship giving directions as to a child's surname the Director shall amend the registration in accordance with the order by making the necessary notation thereon.

(c) by repealing section 5;

(d) by adding the following after section 34(1):

(1.1) Where the parentage of a child born outside marriage is in issue, any certificate, certified copy or photographic print referred to in subsection (1) is admissible in any court in the Province as evidence of the facts certified to be recorded or recorded therein.

(e) by repealing section 34(3) and (4);

(f) by repealing section 49(k).

[Section 32 - Amendment of *Wills Act*]

Amendment of *Wills Act*

32 *Section 36 of the Wills Act is repealed.*

[Section 33 - Amendment of *Workers' Compensation Act*]

Amendment of *Workers' Compensation Act*

33 *Section 1(1)(c) of the Workers' Compensation Act is amended by striking* "out of wedlock" *and substituting* "outside marriage".

[Section 34 - Repeal of *Legitimacy Act*]

Repeal of *Legitimacy Act*

34 *The Legitimacy Act is repealed.*

[Section 35 - Coming into Force]

Coming into force

35 *This Act comes into force on Royal Assent.*

PART III - ANNOTATED *STATUS OF CHILDREN ACT*

[Section 1 - Definitions]

1 In this Act, unless the context otherwise requires

(a) "child" includes a person who has attained the age of majority;

(b) "Court" means the Court of Queen's Bench or the Provincial Court;

(c) "father" means a man who is

(i) entitled to a legal presumption that he is the father of a child under section 8, or

(ii) declared to be the father of a child in a declaration of parentage granted under section 9;

(d) "director of child welfare" means a person designated by the Minister as a director for the purposes of the *Child Welfare Act*;

(e) "guardianship" means guardianship of the person of a minor child and includes the rights of control and custody of the child, the right to make decisions relating to the care and upbringing of the child and the right to exercise all powers conferred by law upon a parent who is a guardian of a child;

(f) "guardian" means a person with guardianship;

(g) "marriage" includes a void or voidable marriage and "married" has a corresponding meaning;

(h) "mother" means the woman who

(i) gave birth to the child,

(ii) is pregnant and expecting to give birth to a child, or

(iii) is declared to be the mother in a subsisting declaration of parentage granted under section 9;

(i) "parent" means a mother or a father.

Comment

Clause 1(a) - Definition of "child"

1.1 Clause 1(a) defines "child" to include a person who has attained his majority -- in Alberta a person who has attained the age of 18 years (*Age of Majority Act*, s.1). Operationally, this means that the definition embraces the relationship between parent and child for all purposes of the law. The definition would extend, for example, to: (i) the determination of parentage after the child has reached 18 years of age, (ii) maintenance duties that may be owed by a parent to a handicapped adult child, and (iii) the disposition of property to a minor or adult child out of the estate of a parent.

Clause 1(b) - Definition of "Court"

1.2 Clause 1(b) defines "Court" to mean the Court of Queen's Bench or the Provincial Court. The Provincial Court is included because it has jurisdiction over several matters relating to the parent and child relationship, including the jurisdiction, under Part 5 of the *Child Welfare Act*, to order private guardianship.

Clause 1(c) - Definition of "father"

1.3 Clause 1(c) defines "father" by reference to the presumptions of parentage established by the Act. The presumptions in section 8(1) are based on factual circumstances that provide evidence of parentage; the presumption in section 8(2) is founded on a declaration of parentage that has been granted by a Court under section 9.

Clause 1(d) - Definition of "director of child welfare"

1.4 Clause 1(d) defines a director of child welfare in accordance with the provisions of the *Child Welfare Act* for the purposes of notice, investigation and representation under section 10.

Clause 1(e) - Definition of "guardianship"

1.5 Clause 1(e) defines "guardianship" to mean guardianship of the person of a minor child.

1.6 Considerable confusion exists in the law at present about the relationship between the concepts of guardianship and custody. Most judges look upon guardianship as the more inclusive concept; some treat guardianship and custody as interchangeable; a few regard custody as the overarching concept.

1.7 Because there is confusion, the definition specifies that guardianship includes the rights of control and custody of the child, the right to make

decisions relating to the care and upbringing of the child and the right to exercise all powers conferred by law upon a parent who is a guardian of a child. That is to say, among other incidents, guardianship encompasses the custody of the child, access to the child, and control over the education and religion of the child. The definition should help to reduce the existing confusion.

Clause 1(f) - Definition of "guardian"

1.8 Clause 1(f) defines "guardian" to mean a person with guardianship.

1.9 Section 3 specifies the persons who are the guardians of a minor child by virtue of this Act.

Clause 1(g) - Definition of "marriage" and "married"

1.10 Clause 1(g) defines "marriage" and "married" to include a void or voidable marriage. The definition has the effect of including within the presumption of parentage of a child conceived or born to parents who are married to each other, a child of a void or voidable marriage who is legitimated under the existing law by the *Legitimacy Act*. A separate presumption of parentage is provided where the parents marry after the birth of the child -- another situation in which the child is legitimated under the *Legitimacy Act*.

Clause 1(h) - Definition of "mother"

1.11 Clause 1(h) defines "mother" for the purposes of the Act. The definition is consistent with the definition of "biological mother" in the *Child Welfare Act*, s.1(1)(b) and of "mother" in the recently-enacted *Parentage and Maintenance Act*, s. 1(1)(j).

Clause 1(i) - Definition of "parent"

1.12 Clause 1(i) defines "parent" to mean a mother or a father, as does the *Parentage and Maintenance Act*, s. 1(l).

Part 1 - APPLICATION OF ACT

[Section 2 - Application of Act]

2(1) Subject to subsection (2), this Act applies to any person born, and any instrument, Act or regulation executed, before as well as after its commencement.

(2) This Act does not affect rights vested before its commencement.

Comment

Subsection 2(1) - Retrospective Operation

2.1 Subsection 2(1) provides for the retrospective operation of the Act. This means that the proposed Act will change the rules of interpretation of words referring to family relationship, and will apply to wills and other instruments executed before it commences.

2.2 The reason for the retrospective operation is that the proposals are intended to correct injustice. While it may be that a testator or grantor used words denoting relationship with the intention that they be interpreted according to the law as it was when the words were used, it is more likely that testators or grantors would use those words without directing their minds to the question of their interpretation to include relationships with or through persons born within or outside of marriage.

2.3 The law applicable to an intestacy would, of course, be the law in force when the person dies. For persons dying after this Act takes effect, that would be the law as provided in this Act.

Subsection 2(2) - Preservation of Vested Rights

2.4 Although the Act applies to existing wills and instruments, subsection 2(2) provides that the Act does not apply so as to affect rights which have vested before its commencement.

[Section 3 - Rule of Construction]

3 The rule of construction whereby in a will, deed or other instrument or enactment words of relationship signify only legitimate relationship in the absence of a contrary intention is abolished.

Comment

Section 3 - Construction of words of relationship in written documents

3.1 Section 3 abolishes the common law rule of construction placed on words like "children" and "issue", denoting relationship in a will, deed or other instrument or enactment. (The English House of Lords, in *Hill* v. *Crook* (1873) L.R. 6 H.L. 265, held that words denoting relationship refer *prima facie* to legitimate relationships and not to illegitimate ones. The decision rests on the common law doctrine of *filius nullius*.)

a. Disposition of property by wills and trusts

3.2 Under the existing law, section 36 of the *Wills Act* reverses the common law rule of construction for a mother and her child born outside marriage by treating an illegitimate child as if the child were the legitimate child of the mother.

3.3 By referring specifically to wills, deeds or other instruments or enactments, section 3 of the *Status of Children Act* reverses the rule with respect to all written documents. This comprehensive reversal renders section 36 of the *Wills Act* unnecessary, and section 29 of this Act repeals that section.

b. Gifts to Future Born Children

3.4 A somewhat uncertain rule of public policy prohibits gifts to future born illegitimate children. The existence of such a rule is at least partially rebutted by section 36 of the *Wills Act*. England has reversed the rule by section 15(7) of the *Family Law Reform Act* of 1969.

3.5 Section 5 of the *Status of Children Act* revokes any such rule by eliminating distinctions in the status and rights and obligations of a child and the child's parents based on the birth of a child within or outside marriage.

[Section 4 - Parentage To Be Determined Under this Act]

4(1) Notwithstanding any other Act, if a question with respect to the parentage of a child arises in any other civil proceeding, the question shall be decided as if it had been raised in an application for a declaration of parentage under this Act.

(2) Subsection (1) does not apply to a proceeding to obtain maintenance for a child under the *Parentage and Maintenance Act*.

Comment

Subsection 4(1) - Parentage to be determined under this Act

4.1 The question of parentage can arise collaterally in a proceeding commenced for another purpose, for example, on an application for the custody of a child or maintenance for the child, or with respect to the disposition of property in the estate of a deceased person. Subsection 4(1) ensures that, whenever a question of parentage is raised in a civil proceeding before a court of competent jurisdiction within the province of Alberta, the question will be decided in accordance with the procedure and standards provided in this Act.

Subsection 4(2) - *Parentage and Maintenance Act* excepted

4.2 Subsection 4(2) excepts proceedings under the *Parentage and Maintenance Act* from this provision. That Act succeeds Part 2 of the *Maintenance and Recovery Act* in providing for the affiliation of a parent and child as the foundation for an order requiring a parent to pay maintenance for the child. The provisions of the *Parentage and Maintenance Act* are extraordinary in that s. 15 authorizes a court, if it is unable to determine who is a parent, to declare each of the persons who might be a parent to be a parent for the purpose of ordering the payment of maintenance. Although the proceeding takes place in the Court of Queen's Bench, it is summary in nature. It therefore does not provide the full hearing and determination for all purposes that is intended for this Act.

Part 2 - STATUS AND RIGHTS AND OBLIGATIONS OF CHILDREN AND PARENTS

[Section 5 - Rule of Parentage]

5(1) Subject to section 6, a person is the child of his or her mother and father for all purposes of the law of Alberta, and the status and the rights and obligations of

> **(a) a child with respect to his or her mother or father,**
>
> **(b) a father or mother with respect to his or her child, and**
>
> **(c) all other kindred through the father or mother with respect to a child**

exist independently of whether the child is born within or outside marriage.

(2) Subsection (1) does not affect the status, rights or obligations of the parents as between themselves.

(3) Any distinction at common law based on the birth of a child within or outside marriage is abolished.

Comment

Subsections 5(1) and (2) - Status and rights and obligations of children

a. Status

5.1 Section 5 is the pre-eminent section of the Act.

5.2 Subsection 5(1) provides that all children enjoy equal status and rights and obligations with respect to their parents. Conversely, the parents and other kindred enjoy equal status and rights and obligations with respect to a child. The declaration of equal status removes all need to refer to or to think of legitimacy and illegitimacy insofar as the law in concerned.

b. Rights and obligations between parent and child

5.3 Under the existing law, the rights and obligations enjoyed by children born within marriage divide into two areas: first, rights and obligations that have to

do with the personal relationship of a minor child with his parents; and, second, rights and obligations that have to do with financial matters affecting a child. These areas will be discussed in turn.

i. Personal relationship of child with parents

5.4 By giving all children equal status and rights and obligations with respect to their parents, subsection 5(1) paves the way for a law that reflects and facilitates the personal relationship between a minor child and both parents, regardless of the birth of the child within or outside marriage.

5.5 Guardianship is the most important of the rights and obligations that have to do with the personal relationship between a minor child and the child's parents. That is because a minor child is necessarily dependent and must look to adults for the fulfilment of the child's material and emotional needs. When read in conjunction with section 7, section 5 makes it possible for more minor children than at present to benefit from the guardianship of both parents immediately from birth or from such time thereafter as parentage is established.

5.6 Amendments to other statutes, necessary to ensure the equal treatment of children in their personal relationship with their parents regardless of their birth within or outside marriage, are introduced in sections 19 to 34 which contain consequential amendments.

ii. Financial matters Affecting a child

5.7 The financial matters affecting the child have to do with maintenance and property rights. Section 5 entitles all children to the financial benefits that the law currently gives, from or through the child's parents, to a child born within marriage.

(A) Maintenance of child

5.8 Under the existing law, a child born within marriage has the right to be maintained by both parents and through the parent, in some situations, by other kindred. The parents, or other kindred, have a corresponding duty to maintain the child.

5.9 The duty to provide maintenance may be owed by a living person or out of the estate of a deceased.

5.10 *Maintenance by a living person.* Under the existing law, the duty of a living parent to provide maintenance for a child is prescribed in various Acts. For example:

(1) Parents who are able to do so have a duty to provide their child under the age of 16 years with maintenance including adequate food, clothing, medical aid and lodging, under s. 2(2) and (3) of the *Maintenance Order Act*. (According to section 3(2), the liability of the mother does not arise unless the father is unable and she is able to maintain the child.)

(2) The father or mother of a child may be ordered to pay maintenance for a child on an application for custody, under s. 56(5) of the *Domestic Relations Act*, brought before the Court of Queen's Bench; or to reimburse another person, school or institution for the cost incurred in bringing up a child, under s. 58 of the *Domestic Relations Act*. A parent may also be ordered to pay maintenance for a child born within marriage in a

summary proceeding brought before a provincial judge under section 27 of the *Domestic Relations Act*.

(3) A person who is declared to be a parent under s. 15 of the *Parentage and Maintenance Act* may, under section 16(2)(b) and (c), be ordered to pay maintenance for the child until the child reaches the age of 18 years.

5.11 A duty, similar to the duty under s. 2(2) and (3) of the *Maintenance Order Act*, to provide necessaries of life for a child under the age of sixteen years is imposed on a parent, guardian or head of a family by s. 197 of the federal *Criminal Code*.

5.12 Under the Act, these duties are owed to children born within or outside of marriage. Anomalously, however, because of the wording of s. 27 of the *Domestic Relations Act*, the Provincial Court is only able to enforce the duty to pay maintenance to a child born within marriage. Maintenance for a child born outside marriage is enforced in proceeding before the Court of Queen's Bench under the *Parentage and Maintenance Act*.

5.13 *Maintenance out of the estate of a deceased person*. Under the existing law, a child born within marriage who is a dependent has the right to proper maintenance and support out of the estate of a deceased parent on an order made under s. 3 of the *Family Relief Act*. Sections 1(d)(ii) and (iii) of that Act define a dependent child as a child who is under the age of 18 years at the time of the death of the deceased parent, or who is 18 years of age or over and unable by reason of mental or physical disability to earn a livelihood.

5.14 Under the *Status of Children Act*, the duty to maintain will be owed by parents to their dependent children, regardless of the nature of the relationship between the parents when the child is conceived or born.

(B) Disposition of property to child

5.15 The disposition of property consists of parting with the ownership of property. Property may be disposed of by intestate succession, will, other written instrument, or under the *Administration of Estates* Act.

5.16 *Intestate succession*. Under the existing law, a child born within marriage is entitled to share in the estate of a deceased mother or father under s. 3 of the *Intestate Succession Act*.

5.17 Section 26 of the *Status of Children Act* amends the *Intestate Succession Act* so that child will enjoy these rights of succession, regardless of the birth of the child within or outside marriage.

5.18 *Will*. Under the existing law, for purposes of the construction of a will, except where a contrary intention appears, words denoting family relationship are construed to mean legitimate relationships. Section 3 of the *Status of Children Act* abolishes this rule of construction with the result that words denoting parent and child will embrace children born within or outside marriage.

5.19 *Other written instrument*. The same rule of construction that applies to wills under the existing law also applies to the construction of other written instruments. Section 3 also abolishes

the rule of construction where it applies to other written instruments.

5.20 *Administration of estates.* Under the existing law, on the death of the mother or father, s. 7 of the *Administration of Estates Act* entitles a dependent child who is born within marriage to a copy of the application for a grant of probate or administration and notice of the rights of dependants under the *Family Relief Act*. Under the *Status of Children Act*, a dependent child will have the benefit of those entitlements whether or not the child was born within marriage.

(C) Obligations of child to parents

5.21 *Maintenance.* In some circumstances, a child has a duty to maintain the parents. Under the Act the same duties and obligations are owed by all children, regardless of the birth of the child within or outside marriage.

5.22 The duties include the duty of children under s. 2 of the *Maintenance Order Act* to maintain a father or mother who is

> (a) old, blind, lame, mentally deficient or impotent, or
>
> (b) destitute and not able to work.

5.23 *Disposition of property.* The mother and father may share in the estate of their deceased child under sections 5, 6, 7 and 8 or the *Intestate Succession Act*. Section 26 of this Act amends the *Intestate Succession Act* so that it will apply equally to all children regardless of the birth of the child within or outside marriage.

c. Rights and obligations between child and other kindred

5.24 Subsection 5(1) also establishes the equal status and rights and obligation of the child, through the parents, to other kindred, regardless of the birth of the child within or outside marriage. Under the existing law, children have rights to be maintained by, and to the disposition of the property of, other kindred.

5.25 *Maintenance.* Where the parents are unable to provide their child under the age of 16 years with maintenance, the duty to provide that maintenance is owed by the grandfather if he able and, if the grandfather is unable, by the grandmother if she is able. This duty is set out in sections 1(b) and (c), 2(2) and (3), and 3(2)(b) and (c) of the *Maintenance Order Act*.

5.26 On occasion, children owe certain corresponding obligations, through their parents, to other kindred. These duties include the duty of children under s. 2 of the *Maintenance Order Act* to maintain a grandfather or grandmother who is

> (a) old, blind, lame, mentally deficient or impotent, or
>
> (b) destitute and not able to work.

(The liability of a grandchild does not arise unless the children are unable to maintain the grandparent.)

5.27 *Disposition of property.* Under the existing law, a child may share in the estate of other kindred and other kindred may share in the estate of a deceased child under sections 4, 6, 7 or 8 of the *Intestate Succession Act*.

d. Establishment of parentage

5.28 The enjoyment, by the child and the child's parents and other kindred, of the rights that have been described, and the fulfilment of the obligations, requires that the parentage of the child be established. Part 3 of the Act, entitled "Establishing Parentage", deals with questions relating to the method and time of ascertainment of parentage. As stated previously, section 8 provides for the identification of parents by presumption. Section 9 provides for their identification by declaration of parentage.

5.29 The primary purpose of the identification of the parents is to benefit the child.

e. Consequential amendments

5.30 Amendments to other statutes, necessary to ensure the equal treatment of children, their parents and kindred are introduced in sections 19 to 34 which contain consequential amendments.

Subsection 5(2) - Status and rights and obligations of parents as between themselves

5.31 For the sake of clarity, subsection 5(2) specifies that the equal treatment of children does not affect the status and rights and obligations of the parents of a child to each other.

Subsection 5(3) - Abolition of illegitimacy

5.32 Subsection 5(3) abolishes the statuses of legitimacy and illegitimacy, thereby reinforcing the principle established in subsection 5(1) that all children are equal in their relationship with their parents and other kindred.

[Section 6 - Exception for Adoption]

6 Where an adoption order has been made, section 65 of the *Child Welfare Act* applies and the adopted child is the child of the adopting parent as if the parent were a parent under this Act.

Comment

Section 6 - Exception for Adoption

6.1 The *Child Welfare Act*, in s. 65, provides that when an adoption order is made, the adopted child is the child of the adopting parent and the adopting parent is the parent and guardian of the adopted child for all purposes.

6.2 Section 6 of this Act protects the priority given to the adoptive relationship under s. 65 the *Child Welfare Act*.

[Section 7 - Guardianship]

7 Unless a court of competent jurisdiction otherwise orders,

(a) the mother is a guardian of her minor child; and

(b) the father is a guardian of his minor child if

(i) at the time of the conception or birth of the child or between those times he is married to the child's mother,

(ii) he cohabits with the child's mother throughout the year preceding the child's birth, or

(iii) he marries the mother after the birth of the child and acknowledges that he is the father of the child.

Comment

Section 7 - Guardianship arising from parentage

7.1 Section 7 specifies the persons who are the guardians of a minor child. The mother is a guardian in all cases. The father is a guardian if he satisfies certain presumptions of parentage. In making the parents of a child guardians automatically from birth, section 7 reflects conventional cultural, social and psychological views that hold that it is generally better for children to be brought up by their birth parents than by others in their stead. It also reflects the conventional wisdom that it is ordinarily in the best interests of a child to be raised by two parents -- a mother and a father.

7.2 As stated in the discussion of section 5, guardianship is the most important of the rights and obligations that have to do with the personal relationship between a child and the child's parents.

a. A Minor Child

7.3 Under the general law, the guardianship of a child ceases when the child becomes an adult. That is because the purpose of guardianship is to provide protection and guidance to the child in the development of the child from total dependence at birth to the attainment of full legal status when the child reaches the age of 18 years. As guardians, the parents have the obligation of seeing to the child's needs from birth and of bringing up the child;

and they have the rights and powers of guardianship which are necessary to enable them to do so.

7.4 Section 7 therefore provides for the guardianship of a *minor* child; the guardianship ceases when the child reaches majority. (Guardianship of the person of an adult requires a court order under the *Dependent Adults Act*).

7.5 In addition to the control and custody of the child specified in the definition of guardianship in section 1(e), the usual incidents of guardianship include: the right to act for the child and to appear in court in the name of the child (*Domestic Relations Act*, s. 46(a) and (b)); the right to manage the child's property (*Domestic Relations Act*, s. 46(c)); the right to make decisions about education (*Domestic Relations Act*, s. 46(d)); the right to direct the religion in which the child should be brought up (*Domestic Relations Act*, s. 60); the right of access to the child (*Domestic Relations Act*, s. 56 -- the right of access is ordinarily, but not necessarily, linked to guardianship); the right to decide the child's name (*Change of Name Act*, sections 4.1, 5, 6, 7, 7.1 and 11); the right to grant or refuse consent in matters concerning the child, *e.g.*, adoption or marriage; the right to notice of matters affecting the child, *e.g.* proceedings to establish parentage, or proceedings for a temporary or permanent guardianship order, or for a private guardianship order, under the *Child Welfare Act*.

b. Guardians

7.6 The automatic provision of the law for guardianship ensures that someone will be responsible for the care and upbringing of the child from birth and that the interests of the child will thereby be met immediately.

7.7 The parents who are recognized as guardians are those persons from whom an affection for the child is assumed to flow naturally, and who, because of the nature of their relationship to each other, are thought to be most likely to exercise the rights and powers of guardianship in the best interests of the child.

i. Clause 7(a) - Mother

7.8 Clause 7(a) continues the existing law which places the child and the woman to whom the child is born in a full legal relationship automatically from birth. The indisputable bond with the woman who bears the child makes her the obvious first choice of person to carry that responsibility in most cases.

ii. Clause 7(b) - Father

7.9 Clause 7(b) makes the father a guardian in three situations. The situations continue and extend the presumption under the existing law that the mother's husband at the time of birth is the father and guardian of the child. They are based on facts from which it can be surmised that the father and mother enjoy or have enjoyed a good personal relationship and that it is therefore in the best interests of the child that this man should be a guardian.

7.10 *Marriage to mother.* Subclause 7(b)(i) continues the presumption under the existing law that a man is a guardian of a child born to a woman to whom he is married at the time of the child's birth, or was married at the time of conception. (The definition of marriage in section 1(g) provides that marriage includes a void or voidable marriage.)

7.11 *Cohabitation with mother.* The existing law recognizes it as being in the

best interests of a child born within marriage to be raised by two parents, a mother and a father. In order to provide equality to a child born outside marriage, subclause 7(b)(ii) provides for a presumption of parentage with guardianship where the parents have cohabited throughout the year before the birth of the child. Cohabitation in this situation is likely to result in an environment which, to the child, is much the same as if the mother and father were married.

7.12 *Subsequent marriage to mother.* Under the existing law, s. 1 of the *Legitimacy Act* recognizes the father as a guardian where he marries the mother after the birth of their child. The marriage and acknowledgment by the man that he is the father of the child is also likely to result in an environment which, to the child, is much the same as if the mother and father had been married when the child was born. Subclause 7(b)(iii) continues the existing law in this regard.

7.13 Section 7 of the *Status of Children Act* replaces s. 47 of the *Domestic Relations Act*, which is the existing guardianship provision, and section 22 repeals it.

c. Exception in case of order otherwise by a court of competent jurisdiction

7.14 The guardianship stipulated in section 7 is subject to the exception of an order of a court of competent jurisdiction otherwise.

7.15 A court has jurisdiction to grant, vary, revoke or otherwise affect guardianship rights in several situations.

(1) First, section 9(3) and (7) of this Act provide that guardianship may be granted with a declaration of parentage under this Act.

(2) Second, where the mother and father cannot agree between themselves, the existing law provides mechanisms for resolving disputes over guardianship and over the incidents of guardianship in an adjudication based on the best interests of the child. The resolution of the dispute could result in the variation and partial diminishment of guardianship rights and powers or their total revocation. As a result of the enactment of the *Status of Children Act* disputes between parents over custody and other incidents of guardianship will be resolved under the laws that now apply to resolve disputes where the parents of the child are married to each other (see *e.g.*, the *Domestic Relations Act* and the *Provincial Court Act*).

(3) Third, where the parents are unable to care for their child properly, the state may intervene. The regime set out in this Act prefers the mother and father of the child to the state, and makes provision to ensure that, where appropriate, both parents of the child are given an opportunity to exercise their rights as parents in a case where state intervention is being considered.

7.16 An order under any of these provisions would take precedence over guardianship arising from section 7.

i. Court order of guardianship under section 9(3) or (7)

7.17 Section 9(3) and (7) permit a person claiming to be the parent of a child to apply for an order of guardianship upon or after the grant of a declaration of parentage.

7.18 As has been stated, the Act will encourage the development of a meaningful social relationship between parents and children, regardless of the birth of children within or outside marriage. Sections 9(3) and (7) allow a parent who is not a guardian under section 7 to transpose the social relationship into a legal relationship involving guardianship of a minor child, and to commence a relationship where one does not already exist. The parent's ability to do so is particularly important if there is not a satisfactory relationship between the child and the other parent but should not necessarily be restricted to such cases.

7.19 Where a parent is not a guardian, the court should evaluate the situation before the rights of guardianship are conferred. It should do so because cases are different. In the case of the relationship between father and child, for example, the child may participate in a highly developed and meaningful association with his father; or, the child may see the father casually or know who he is but not see him at all; or, the child may not know who the father is. The child's mother and father may be on good or bad terms or something in between. The court will have an opportunity to look at the child in the child's immediate environment, and to assess the role which the parent plays or might play and the effect of that role on the growth and maturation of the child before deciding whether it is in the best interests of the child that the parent should be given the rights of a guardian.

7.20 That is one reason for requiring a court decision before a parent who is not already a guardian under section 7 is named as a guardian.

7.21 A second reason is that there is a danger that, if both parents have the powers of guardians, they will be in conflict with each other and that conflict may subject the child to undesirable stress. That is especially likely if the child's parents are living apart. The court should have an opportunity to decide whether there is danger of conflict between the mother and father. If the risks outweigh the likely gains the court will not grant rights of guardianship to the applicant.

7.22 As an additional safeguard, section 10(3) gives the Court discretion to require an applicant for guardianship to submit a report by a qualified professional with respect to the applicant's suitability to be a guardian.

ii. Guardianship order under the *Domestic Relations Act*

7.23 The *Domestic Relations Act* confers jurisdiction to make a guardianship order on the Court of Queen's Bench. Under s. 49 of the *Domestic Relations Act*, the court can appoint a guardian to act jointly with the father or mother of a minor child, and under s. 50 the court can appoint a guardian for a minor child who has no guardian or whose guardian is not a fit and proper person to have guardianship. An order under one of these provisions might remove the mother or father as guardian, or add another person as guardian.

iii. Guardianship order under the *Child Welfare Act*

7.24 Several provisions of the *Child Welfare Act* confer jurisdiction on the Provincial Court to make a guardianship order. In some cases the order names a private individual. In other cases, where it is necessary to protect the child from the parents, guardianship is granted to

the state, in the person of a director of child welfare.

7.25 Private guardianship may be ordered in two situations: (i) where the mother surrenders the child to a director of child welfare under a permanent guardianship agreement; or (ii) where a person has had the continuous care of a child for six months prior to the application for a guardianship order.

(A) Surrender of child by mother

7.26 The *Child Welfare Act*, in s. 11, provides that if the unmarried mother of a newborn child enters into a permanent guardianship agreement under which a director of child welfare will assume the guardianship of the child, the father, within ten days of the birth of the child, may apply for an order terminating the agreement. The Provincial Court has jurisdiction to deem the a man to be the father -- at least where the matter is not contested -- and to appoint him a guardian if he is willing and able to assume the responsibilities of guardianship and if it is in the best interests of the child that he be appointed guardian. The court may also give him custody. The summary procedure afforded in the Provincial Court is needed so that the child may be placed either with the father or with adopting parents, and the Provincial Court order would allow the placement to be made. The result is similar to a declaration of parentage with guardianship, but would not have the same general application as a declaration of parentage with guardianship granted under this Act.

(B) Private guardianship order

7.27 Under the *Child Welfare Act*, s. 53, the Provincial Court may appoint as a guardian any adult who has had the continuous care of a child for a period of more than six months. A father who is not married to the mother but has the appropriate qualification may take advantage of this provision. Again, the result is similar to a declaration of parentage with guardianship, but would not have the same general application as a declaration of parentage with guardianship granted under this Act.

(C) State Intervention

7.28 Ordinarily it is accepted that it is better for a child to be brought up by his birth parents than by others in their stead. However, a parent may abuse his position, or abandon or deny his responsibility. Indeed, it may be evident "by reason of some act, condition or circumstance" affecting the birth parents "that the welfare of the child requires that fundamental natural relation be severed" (*Hepton* v. *Maat* [1957] S.C.R. 606, per Rand J. at 607).

7.29 In the absence of a concerned parent, this role may fall to the state. A temporary or permanent guardianship order granted under the *Child Welfare Act* would upset the guardianship provided in section 7 or an order under section 9(3) or (7) of the *Status of Children Act*. A temporary guardianship order would add a director of child welfare as a guardian along with the parents, and the director would have power to overrule their decisions. A permanent guardianship order would terminate the guardianship of the parents.

7.30 Under section 34(3) of the *Child Welfare Act*, if the court appoints a director of child welfare as a permanent guardian of a child, the court may

appoint as a joint guardian a person who has had a significant and continuous relationship with the child. This could be a father who is not already a guardian under the *Status of Children Act*.

(D) Adoption Order

7.31 An adoption order made under the *Child Welfare Act*, s. 65, would terminate the legal relationship of the birth parents with the child. The adopting parents would become the parents for all purposes of the law as provided in that Act and in section 6 of the *Status of Children Act*.

iv. *Parens patriae* jurisdiction of a superior court

7.32 In rare circumstances, where no legislation governs a matter which raises an issue about the best interests of a child, a superior court may exercise its jurisdiction *parens patriae* to protect the child. This jurisdiction has been invoked, for example, in cases where a parent seeks to have a sterilization procedure performed on a child.

d. Limits of reform

7.33 The Act does not reform the general law of guardianship. That law remains unaffected except insofar as is necessary to render equal the status and rights and obligations of all children, in satisfaction of the requirements of section 5.

7.34 Several consequential amendments will be required to give effect to sections 5. The amendment of section 47 of the *Domestic Relations Act* has been mentioned. Other consequential amendments are provided in sections 19 to 34.

7.35 The dual and sometimes overlapping relationship between the guardianship provisions of the *Child Welfare Act* and the *Domestic Relations Act* is already somewhat complex. This Act adds to the complexity of the guardianship provisions already in place. When this complexity is combined with federal jurisdiction over custody on divorce, and the inconsistent and sometimes interchangeable judicial application of the concepts of custody and guardianship, the result is considerable confusion.

7.36 The general confusion invites reform. However, although an overhaul of guardianship law and legislation may be desirable, it does not fit within the scope of this reform which is directed at equalizing the status of all children in relation to their parents and other kindred. Therefore, only minor amendments with respect to guardianship law are proposed.

Part 3 - ESTABLISHING PARENTAGE

[Section 8 - Presumptions of Parentage]

8(1) A legal presumption that a man is the father of a child exists if

(a) at the time of the conception or birth of the child or between those times he is married to the child's mother,

(b) he cohabits with the child's mother throughout the year preceding the child's birth,

(c) he marries the mother after the birth of the child and acknowledges that he is the father of the child,

(d) he is registered as the father of the child under the *Vital Statistics Act* or under a similar provision of the corresponding statute of another jurisdiction at the joint request of himself and the child's mother, or

(e) both he and the mother of the child acknowledge that he is the father.

(2) A man or woman is presumed to be the parent of a child if he or she is named as a parent in a subsisting declaration of parentage granted under section 9.

(3) The granting of a declaration of parentage under section 9 with or without guardianship terminates any presumption under subsection (1).

Comment

Section 8 - Presumptions of parentage

8.1 Section 5 of the Act confers equal status on all children in relation to their parents, for all purposes of the law, regardless of the birth of a child within or outside marriage. The fulfilment of the rights and obligations

that flow between a child and the parents requires that the parent be identified.

8.2 Section 8 provides for the identification of the parents of a child by presumption. The presumptions set up rights and obligations which exist for the benefit of the child. They give rise, in every case, to the financial rights and obligations that flow from the relationship between parent and child. Some of the presumptions form the basis for the conferral of guardianship rights and powers on the parent under section 7. Other presumptions, irrespective of guardianship, entitle a parent to receive notice of, or give consent to, certain matters affecting the child.

Subsection 8(2) - Mother

8.3 Ordinarily, no presumption is needed for the mother. She will be identified under the definition of the mother, in section 1(h), as the woman who gave birth to the child or is pregnant and expecting to give birth to a child not yet born. However, in this era of rapid technological advancement in assisted human reproduction, new variations are possible. The Act therefore empowers the Court to name the mother in a declaration of parentage under section 9, and a subsisting declaration operates as a presumption under subsection 8(2).

Subsections 8(1) and (2) - Father

8.4 Subsection 8(1) provides for the identification of the father of a child by one or another of the five presumptions set out in clauses (a) to (e). The facts that support a presumption that a man is the father of a child are described in terms of the social relationship of the man to the mother.

8.5 *Marriage to mother at time of conception or birth of child.* Clause 8(1)(a) continues the presumption under the existing law that the man who is married to the mother at the time of the conception or birth of the child or between those times is the father of the child.

8.6 *Cohabitation with mother.* By analogy with a married couple, clause 8(1)(b) establishes the presumption that a man who, throughout the year before the child's birth, cohabits with the woman who gave birth to the child is the father of the child. Cohabitation throughout this period makes it likely that the man is the father in the same way as does cohabitation within marriage.

8.7 *Marriage to mother subsequent to birth of child.* Clause 8(1)(c) establishes the presumption that a man is the father of a child if he marries the woman who gave birth to the child after the child's birth and acknowledges that he is the child's father. These circumstances make it likely that the man is the father and desirable that he be presumed to be so. This presumption, and the guardianship that arises from it, is consistent with legislation in other Canadian jurisdictions.

8.8 *Registration at request of father jointly with the mother.* Clause 8(1)(d) establishes the presumption that a man is the father if he is registered as the father of a child at the joint request of himself and the mother. In Alberta joint registration is provided for in s. 3(8) and (9) of the *Vital Statistics Act*. Under s. 34 of that Act, registration provides *prima facie* evidence of paternity (unless, under the existing law, that evidence would render illegitimate a child presumed legitimate).

8.9 The likelihood that concurrent registration demonstrates paternity applies equally to registration under a similar provision of the corresponding statute of another jurisdiction and such registration also raises a presumption under clause 8(1)(d).

8.10 Registration of a man as father at the joint request of the man and the woman who gave birth the child does not make the man a guardian of the child. In other words, clause 8(1)(d) raises a presumption of paternity without guardianship. In the absence of cohabitation with the mother throughout the year preceding the birth of the child, this man would not be able to exercise the rights and powers of a guardian unless they are granted by a court.

8.11 *Acknowledgment by father and mother.* Clause 8(1)(e) establishes a presumption of the parentage of a man when both he and the mother acknowledge that he is the father. The acknowledgement of paternity by both the man and the mother make it likely that he is the father. Acknowledgement under clause 8(1)(e) does not make the man a guardian of the child. As in the case of joint registration under clause 8(1)(d), it simply raises a presumption of paternity without guardianship -- in the absence of cohabitation with the mother throughout the year preceding the birth of the child, this man would not be able to exercise the rights and powers of a guardian unless they are granted by a court.

8.12 *Declaration of parentage.* Because the social circumstances may not coincide with the genetic truth and because of the variations on nature made possible by new reproductive technologies, the Act empowers the Court to name the father in a declaration of parentage under section 9. As in the case of a declaration that names a woman as the mother, a subsisting declaration operates as a presumption under subsection 8(2).

8.13 *Conflicting presumptions.* A presumption based on the factual circumstances described in subsection 8(1) of the Act stands until it is terminated by a court declaration of parentage. This means that the facts may support a presumption that more than one man is the father of a child. In this situation, both presumptions will stand until a court makes a decision between them. Allowing the presumptions of parentage to stand will help family life to go on as much as possible without litigation in court over parentage.

8.14 The *Parentage and Maintenance Act* which came into force in Alberta on January 1, 1991 provides that where presumptions of parentage conflict there is no presumption. It would no doubt be unfortunate if, say, the mother's husband and the man who cohabited with the mother were both to assert rights as a child's father. However, it would be even more unfortunate if neither could do so. There will be cases in which conflicting presumptions arise but in which only one will be asserted for the very good reason that that is the one which is true. In the foregoing example, the man who lives with the mother, and particularly the man who afterwards marries the mother and acknowledges his paternity of the child, should be able to act as the child's father without the necessity of going off to court to get a declaration of parentage.

8.15 If the question of paternity is raised in proceedings for a declaration of parentage under section 9 and there are conflicting presumptions, the court

can make a decision on the balance of probabilities.

Subsection 8(2)

8.16 As already stated, subsection 8(2) presumes the parentage of a man or woman named in a subsisting declaration of parentage granted under section 9. It is necessary to refer to a *subsisting* declaration because section 11 authorizes a court to set a declaration of parentage aside, in which event the declaration loses its presumptive effect.

8.17 No presumption is provided where a court of competent jurisdiction has found a man or woman to be the father or mother of a child in another proceeding. That is because section 4 requires a question of parentage that arises in any other civil proceeding to be decided as if it had been raised in an application for a declaration of parentage under this Act. Formal proceedings of this kind are a desirable protection for everyone concerned. A decision about parentage should be made in proceedings to which the child, the mother or the alleged father are parties and in which the far reaching consequences of the determination are understood.

Subsection 8(3) - Termination of Presumption

8.18 A declaration of parentage under section 9 terminates a presumption of parentage other than a presumption based on a subsisting declaration of parentage.

[Section 9 - Declaration of Parentage]

9(1) A person claiming to be the father, mother or child of another person or the father of an unborn child may apply by originating notice to the Court for a declaration of parentage.

(2) The Court shall grant a declaration of parentage upon being satisfied, on a balance of probabilities, that the alleged father or mother is the father or mother of the child or unborn child.

(3) If a person who claims to be the father or mother of a minor or unborn child under subsection (1) seeks to be named a guardian, the Court may grant the declaration of parentage

(a) with guardianship, or

(b) with access but not guardianship.

(4) The Court shall not grant a declaration of parentage with guardianship or access unless it is satisfied that the order is in the best interests of the child and, in the case of guardianship, that the applicant is able and willing to assume the responsibility of a guardian towards the child.

(5) In a declaration of parentage with guardianship the Court

(a) may exclude any of the rights of guardianship, and

(b) shall provide for the surname by which the child is to be known.

(6) A guardian named in a declaration of parentage with guardianship is a guardian in addition to any other guardian of the child.

(7) At any time after it has made a declaration of parentage, the Court, upon application by originating notice

made by a person described in subsection (1) and upon being satisfied that it is in the best interests of the minor or unborn child so to do, may

(a) revoke a right of guardianship or access granted by order,

(b) confer guardianship or access in accordance with subsections (3) and (4) if the declaration of parentage did not do so,

(c) vary the declaration as to rights of guardianship granted or excluded by it.

(8) An application under this section may be brought on behalf of the child by any person acting on the child's behalf.

(9) The Court has jurisdiction under this section if the child or an alleged parent against whom an application is brought is resident in Alberta.

Comment

Section 9 - Declaration of Parentage

9.1 Section 9 authorizes the Court of Queen's Bench or the Provincial Court to grant a declaration of parentage. The proceeding for a declaration of parentage makes it possible for a parent to establish parentage where the facts do not support a presumption of parentage under section 8, or where two presumptions of fact conflict.

Subsection 9(1) - Applicant

9.2 Subsection 9(1) provides for the commencement of proceedings for a declaration of parentage by an application made by originating notice. An application may be brought, after the birth of the child, by one of three persons: (i) the child or, if the child is a minor, any person acting on the child's behalf (see subsection 9(8)); (ii) a man claiming to be the father of the child; or (iii) a woman claiming to be the mother of the child. An application may also be brought with respect to an unborn child, for the purpose of establishing the relationship to the child from the moment of birth, by any man alleging himself to be the father or any woman alleging herself to be the mother.

An application for a declaration of parentage will usually be brought to identify the man who is the father of a child. However, the variations on parentage made possible by the new human reproduction technologies make it necessary that the application should also be available to identify the woman

who is the mother of the child where doubt exists.

Subsection 9(2) - Grant of declaration

9.3 Under subsection 9(2), the court must grant a declaration of parentage if it is satisfied that the alleged father or mother is the father or mother of the child or unborn child.

Subsection 9(3) - Declaration of parentage with guardianship

9.4 Clause 9(3)(a) permits the court to grant a declaration of parentage with guardianship where the application is made by a person claiming to be the father or mother of a minor or unborn child. The provision makes it possible for a person who is not a guardian to establish parentage and obtain guardianship in one proceeding, or to obtain guardianship at another time, after a successful application for a declaration of parentage.

9.5 The parents who take the step of applying for guardianship will be those persons who wish to assume the parental role and acquire the legal rights and powers of a parent, including custody and control and the right to make decisions relating to the care and upbringing of the child.

9.6 Short of guardianship, upon or after making a declaration of parentage, the court may order that the parent shall have the right of access to the child. It is, of course, clear that the court would be able to refuse all rights of guardianship including access.

Subsection 9(4) - Best interests of child

9.7 Before making an order of guardianship or access, the court must be satisfied that the order is in the best interests of the child. In the case of guardianship, the court must also be satisfied that the applicant is able and willing to assume the responsibility of a guardian towards the child.

9.8 The test of what is in the best interests of the child has many formulations. In a dispute over guardianship under the existing law between parents of a child born within marriage, or in a dispute over decisions relating to any of the incidents of guardianship, the exercise of the rights and powers of guardianship generally calls for the weighing of all relevant factors. In determining whether guardianship would be in the best interests of the child when a declaration of parentage is made, the court would probably consider factors such as the following:

(1) the child's blood relationships and racial-cultural heritage, and established familial or other social relationships;

(2) the preference, having regard to the child's age, sex, previous experiences and circumstances generally, to be given to the continuity of established relationships, and the effect of change on the child;

(3) the love and affection shown by competing parties for the child and its value in terms of the child's emotional growth;

(4) the stability and permanency of the homes which competing parties offer;

(5) the abilities of competing parties to provide for the child's physical and mental well-being;

(6) the moral fitness of competing parties as demonstrated by their character and conduct, and its effect on the child; and

(7) the wishes of the child.

9.9 There are no clear-cut guidelines as to the weight to be attached to one factor or another. What is important is the balancing of all relevant factors.

Subsection 9(5) - Powers and duties of Court on a declaration of parentage with guardianship

a. Restriction of guardianship rights

9.10 In making a declaration of parentage with guardianship, clause 9(5)(a) gives the Court discretion to mould the authority of the parent as guardian to suit the circumstances by excepting one or more of the usual incidents of guardianship, *e.g.* the right to the custody of the child.

b. Surname

9.11 When making a declaration of parentage with guardianship, clause 9(5)(b) requires the Court to decide the surname by which the child is to be known.

Subsection 9(6) - More than one guardian

9.12 Subsection 9(6) specifies that the guardianship of a parent named under section 9 does not displace, but is in addition to any other guardian.

Subsection 9(7) - Variation of guardianship

9.13 Subsection 9(7) authorizes the Court to confer or revoke an order relating to guardianship made upon or after a declaration of parentage is granted.

Subsection 9(8) - Application on behalf of child

9.14 Subsection 9(8) verifies that an application may be brought on behalf of the child by any person acting on the child's behalf.

Subsection 9(9) - Court jurisdiction

9.15 Jurisdiction to hear an application under section 9 extends to those cases where the child, or the alleged parent against whom the application is brought, is resident in Alberta.

[Section 10 - Notice of Application]

10(1) Unless the Court otherwise directs, notice of an application for a declaration of parentage shall be given to

(a) the person claimed to be a child, where the person is 12 years of age or older,

(b) any person named by law to be served on behalf of the person claimed to be a child,

(c) the guardian and the trustee of a dependent adult, or in the absence of a guardian or trustee, the Public Guardian or the Public Trustee,

(d) any other person claiming to be a parent, and

(e) a director of child welfare in a case under subsection (3).

(2) Upon the application the Court shall

(a) consider whether or not any other person should receive notice; and

(b) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

(3) Where the father or mother is not a guardian of his or her minor child under section 7 and applies to be named a guardian under section 9(3) or (7), the Court may require the applicant to provide it with a report in the prescribed form prepared by a qualified person respecting

(a) the suitability of the applicant as a guardian,

(b) the ability and willingness of the applicant to assume the responsibility of a guardian towards the child, and

(c) whether it is in the best interests of the child that the applicant be appointed as a guardian of the child.

(4) If the applicant is the subject of a permanent guardianship agreement or order under the Child Welfare Act, the report required under subsection (3) shall be prepared by a director of child welfare.

(5) If the child is not the subject of a permanent guardianship agreement or order, the applicant shall serve a copy of the report required under subsection (3) on a director of child welfare not less than 2 days before the report is provided to the Court.

(6) On being served with a notice of an application for a guardianship order, a director of child welfare may conduct an investigation with respect to the proposed guardianship and may make representations to the Court at the time the application is heard.

(7) If a director of child welfare intends to make representations to the Court under subsection (6), he shall notify the Court and the applicant not less than 2 days before the date of the hearing of the application.

Comment

Subsections 10(1) and (2) - Notice of application for declaration of parentage

10.1 Subsections 10(1) and (2) are designed to ensure, insofar as possible, that all persons with a proper interest receive notice of the application.

a. Mandatory notice

10.2 Subsection 10(1) provides for mandatory notice to: (i) the child; (ii) if the child is a dependent adult, the guardian and the trustee, if any; (iii) any person claiming to be a parent; and (iv) where the application for a declaration includes an application for guardianship, a director of child welfare. The latter notice is related to subsection 10(3) which requires notice to be given to a director of child welfare where the Court directs an investigation into the applicant's suitability to be named a guardian.

10.3 The notice requirements in subsection 10(1) are subject to a court order otherwise.

b. Court-directed notice

10.4 Subsection 10(2) compels the Court, first, to consider whether any other person should receive notice of the application for a declaration and, second, to direct that notice be given to any person who, in the opinion of the court, should have an opportunity to be heard. It is included to provide additional assurance that all persons with a proper interest will know about the application and be given an opportunity to participate in it.

Subsections 10(3) to (7) - Guardianship report

10.5 As a safeguard to the child, subsection 10(3) provides that the Court may require the applicant to provide it with a report on the applicant's suitability to be named a guardian, the applicant's ability and willingness to assume the responsibilities of a guardian, and whether the guardianship would be in the best interests of the child. This provision, and those that follow in subsections 10(4) to (7), parallel s. 51(1) to (5) of the *Child Welfare Act* which provides for a report by a qualified person on an application for private guardianship.

10.6 The purpose of the report is to assist the Court in deciding whether the applicant is ready, willing and able to undertake all of the obligations of parentage, including responsibility for the care and upbringing of the child.

10.7 If the child is under the permanent guardianship of a director of child welfare under the *Child Welfare Act*, subsection 10(4) requires that the report be prepared by a director of child welfare. In other cases, subsection 10(5) provides that a copy of the report must be served on a director of child welfare. The director may conduct an investigation under subsection 10(6) and is entitled under subsections 10(6) and (7), upon notifying the Court and the applicant, to be heard on the application.

[Section 11 - Duration of Declaration]

11(1) A declaration of parentage remains in force until it is set aside under this section.

(2) An application to set aside a declaration of parentage may be made, with the leave of the Court,

(a) to the Court that granted the declaration, or

(b) to the Court of Queen's Bench.

(3) Notice of the application shall be given in the manner prescribed by section 10(1) and (2).

(4) The Court hearing the application may confirm the declaration of parentage or set it aside.

(5) The setting aside of a declaration of parentage does not affect rights which vested while the declaration was in force.

Comment

Subsection 11(1) - Duration of a declaration of parentage

11.1 A declaration of parentage takes effect as a presumption of parentage, according to section 8(2). This means that it does not determine parentage for all purposes and for all time. It may later be set aside under section 11.

11.2 The reason for this is that the usual arguments in favour of the finality of decisions do not outweigh the harm which would be done if the law should obstinately continue to declare that one person is the child's parent after it has been conclusively shown that another person is in fact the parent. A declaration which establishes parentage is not like a divorce decree; it determines the existence of a relationship and does not change a status by its own force.

11.3 Although it is expected that a declaration solemnly pronounced after a formal proceeding will rarely be set aside, nevertheless the possibility is there to prevent a continuing and very grave injustice in case of error, for example, where the evidence upon which the declaration is made was perjured or mistaken, or conclusive new evidence has been discovered.

Subsection 11(2) - Application to set declaration aside

11.4 Under subsection 11(2) an application to set aside a declaration of

parentage can be made either to the Court that granted the declaration or, in the case of a declaration granted by the Provincial Court, to the Court of Queen's Bench. The application to set aside requires the leave of the Court to which the application is made.

Subsection 11(3) - Notice of application

11.5 Notice of an application to set aside a declaration of parentage is governed by sections 10(1) and (2). In short, the persons who are entitled to notice of an application for a declaration of parentage are also entitled to notice of an application to set the declaration aside.

Subsection 11(4) - Power of court

11.6 Subsection 11(4) authorize the Court either to confirm the declaration or to set it aside. Setting the declaration aside terminates its presumptive effect and, consequently, cancels future obligations that would otherwise arise under it.

Subsection 11(5) - Vested rights

11.7 Subsection 11(5) protects rights that have vested under a declaration of parentage so that setting aside the declaration does not allow recovery of payments made or property transferred under it.

[Section 12 - Registration for Notice Purposes]

12(1) A person claiming to be the parent of a child may file with the Director of Vital Statistics:

(a) a declaration of parentage, or an affidavit of parentage in the prescribed form attesting to the facts on which the claim is based;

(b) if not otherwise provided, the name, date of birth, place of birth and sex of the child and, if known, the birth registration of the child and the name of the other parent; and

(c) the parent's address for service within the province which the parent may change from time to time by notice in writing filed with the Director of Vital Statistics.

(2) The Director of Vital Statistics shall

(a) maintain a register of declarations of parentage and affidavits filed under subsection (1) and of fathers registered at the request jointly with the mother under section 3(8) of the Vital Statistics Act; and

(b) provide the name and address of a person claiming to be a parent of the child to

(i) any party to a proceeding or proposed proceeding involving the child,

(ii) any person requiring the consent of the parent to a matter affecting the child.

(3) Unless the court having jurisdiction over the subject matter of a proceeding otherwise orders, service of a notice by registered mail addressed to the last address for service filed with the Director of Vital Statistics is good and sufficient service.

(4) Subject to subsection (2), information filed under this section shall be treated as confidential and it shall not be published, released or disclosed in any manner that would be detrimental to the personal interest, reputation or privacy of the person claiming to be the parent, the child, or any other person.

(5) If, on an application for a declaration of parentage under this Act, the Court makes a finding that a person filing an affidavit under subsection (1) is not the parent of the child, it may direct that the affidavit be removed from the register and the affidavit thenceforth shall be deemed not to have been filed.

Comment

Section 12 - Registration for purposes of notice and consent

12.1 Section 12 provides a mechanism by which a person claiming to be the parent of a child can register for the purposes of receiving notice to which a parent is entitled in matters affecting the child, and of giving consent.

Subsection 12(1) - Registration by a person claiming to be a parent

12.2 Subsection 12(1) allows a person claiming to be a parent to register the fact with the Director of Vital Statistics by filing a declaration of parentage granted under section 9 or an affidavit attesting to the facts on which the claim to parentage is based. In either case, the parent is required to supply the Director with enough information to identify the child in his records and with an address for service. Notice at the address will bind the father, so that it is incumbent on him to keep it up to date.

12.3 Under subsection 12(1), a person may register the claim to parentage unilaterally. Abuses are not anticipated because of the burdens that accompany the benefits of registration -- a person who files an affidavit in the proposed register will be almost certain to have to bear at least the financial burdens of parentage, and will gain only the right to receive notice and an opportunity to give or withhold a consent which the court will ultimately be able to dispense with.

Subsection 12(2) - Notice and consent requirements

12.4 The entitlement of parents to know about matters affecting their child usually stems from guardianship, but parents who are not guardians may have the right to receive notice or give consent to matters affecting their child (*e.g.*, section 10(1) provides for such notice on an application for a declaration of parentage made under this Act).

12.5 If the right to notice and the requirement of consent are to be meaningful, it must be possible for persons under a duty to give notice or obtain consent to find the persons

entitled to receive it or from whom it is required. The procedure should not be too onerous.

12.6 To this end, Clause 12(2)(a) requires the Director of Vital Statistics to maintain a register of parentage. (The system already exists for registration, under the *Vital Statistics Act*, s. 3(8), of a man as father at the joint request of the mother and himself.) Clause 12(2)(b) requires the Director to provide the information on that register to any party to a proceeding involving the child, and to any person requiring the consent of the parent to a matter affecting the child.

12.7 The register will assist parents who wish to make their existence known, and it will help persons under a duty to notify a parent -- guardian or not -- to discover the fact of existence and the location of that parent. It is implicit in the notion of one status for all children that parents should be entitled to receive notice or give consent regardless of the birth of the child within or outside marriage.

a. Notice

12.8 Notice requirements under related statutes are dealt with in the consequential amendments in sections 19 to 33. In most cases, the amendment places a duty on the court to consider whether any person not already served should receive notice with a view to ensuring that everyone with a proper interest in a child's welfare would have an opportunity to appear.

b. Opportunity to be Heard

12.9 It is understood implicitly that a person who is entitled to notice is entitled to be heard. The court also has a discretion to hear a person who is not entitled to notice if the person indicates an interest in the proceedings and asks to be heard. This discretion could be exercised in favour of a father who has not been notified of proceedings relating to his child but learns of them. The power of the court to hear or add an interested party is referred to by Legg, D.C.J. in *Re N.V.C.* [1973] 5 W.W.R. 257 at 262:

> I can visualize cases in which it would be in the best interests of the child to have the putative father represented by counsel. I am of the opinion that a discretion lies in the court to allow the putative father or any other person to be represented and take part in the proceedings. The courts have exercised this discretion in other branches of the law, particularly in probate matters. However, the onus rests with the putative father to make application to the court to be heard and to be represented, and demonstrate to the court the reasons why it should exercise its discretion in his favour. Failing this, the putative father has no status before the court in wardship proceedings.

c. Consent

12.10 Some statutes require the consent of the parents to certain proceedings and events. Examples include:

(1) consent (of a guardian), under s. 56 of the *Child Welfare Act*, to the adoption of the child;

(2) consent, under s. 18 of the *Marriage Act*, to the marriage of a child under eighteen year; and

[Note: With the exception of a girl who is pregnant or the mother of a living child, a person under the age of sixteen years is not permitted to marry (s. 16). Certain consents, in most cases the consents of the mother and father, must be given to the marriage of any person under eighteen years of age (s. 18). Where the parents are divorced or separated, the person having legal custody may give the consent.]

(3) on an application under the *Change of Name Act*, s. 16, consent of the other parent to the change of name of their child.

d. Power to dispense with notice or consent

The individual Acts that confer the entitlement to notice or the requirement of consent usually authorize the court to dispense with the notification or consent where it is unlikely to serve any useful purpose, or where delay is likely to be prejudicial to the child. No further power is needed here.

Subsection 12(3) - Service of notice

12.11 Subsection 12(3) provides for service of notice by registered mail to the last address for service filed with the Director of Vital Statistics. Service by registered mail is good and sufficient service unless the court having jurisdiction over the proceedings orders otherwise.

Subsections 12(2) and (4) - Confidentiality of information on the register

12.12 The register is not available for inspection by the world at large. On the contrary, subsections 12(2) and (4) provide that the information contained in it may be disclosed only to the parties to any proceeding or proposed proceeding involving the child, or to persons requiring the consent of a parent.

Subsection 12(5) - Consequences of registration, benefits and burdens

12.13 Since the burdens are substantial and the benefits, except to an interested parent, are not substantial, the filing of affidavits is unlikely to be abused. Subsection 12(6) nevertheless provides that, in case of error, a false claim to parentage may be removed from the register.

12.14 The register is important to achieve equality for all children and their parents, even though keeping it might cause some administrative problems for the Director of Vital Statistics.

Part 4 - EVIDENCE OF PARENTAGE

[Section 13 - Court Orders Determining Parentage]

13 A court in Alberta before which the parentage of a child is in issue in a civil proceeding

(a) shall have regard to any subsisting presumption of parentage under section 8, and

(b) shall admit as evidence an order or judgment of any court of competent jurisdiction which expressly or by implication determines the parentage of the child.

Comment

Clause 13(a) - Presumption of parentage

13.1 When the parentage of a child is in issue in a civil proceeding, clause 13(a) requires a court to have regard to any subsisting presumption of parentage under section 8. The presumptions under section 8 include the presumption created by a declaration of parentage granted under section 9 which terminates any presumptions based on factual circumstances.

Clause 13(b) - Court order determining parentage

13.2 Clause 13(b) requires a court to admit as evidence a finding of parentage, express or implied, made by a court of competent jurisdiction. Such a finding is admissible as evidence in a later proceeding so that the second court can accept it unless it is explained away or effectively contradicted.

13.3 In contrast to clause 13(a), the court is not expressly required to have regard to a finding of parentage made in another proceeding. Whereas a declaration of parentage under this Act will be granted after formal proceedings in which all available evidence has been adduced and considered, other proceedings are likely to be brought for a narrower purpose. The issue in the other proceedings may or may not involve all of the interested persons and may be dealt with by a summary procedure.

13.4 Clause 13(b) will apply to orders or judgments made by courts in Alberta before the *Status of Children Act* is proclaimed into force. After that date, section 4 requires that a question of parentage be decided in accordance with this Act.

No Corroboration Requirement

13.5 Formerly, statutes providing for affiliation proceedings usually required the corroboration of evidence offered by the mother as to the paternity of a child. Section 19(1) of the *Maintenance and Recovery Act*, now repealed by the

Parentage and Maintenance Act, is an example.

13.6 The evidentiary trend today is a movement away from technical requirements that tie the hands of the courts in doing justice. (In this regard, see the *Uniform Evidence Act*, and Alberta Law Reform Institute Report 37B, *Evidence and Related Subjects: Specific Proposals for Alberta Legislation*.) The *Status of Children Act* therefore does not include any corroboration requirement.

13.7 What is more, a Saskatchewan court has held that the requirement for corroboration of the evidence of a single woman concerning the paternity of her child is inconsistent with the guarantee of equality before the law under section 15 of the *Canadian Charter of Rights and Freedoms* and therefore unconstitutional and of no force and effect: *Bomboir v. Harlow* [1987] 5 W.W.R. 55 (Sask. U.F.C.).

13.8 It is also relevant to note that a conviction of rape can now be made upon the uncorroborated evidence of the complainant. It would be incongruous to provide that what amounts to a money judgment cannot be obtained upon evidence upon which a serious criminal conviction can be made and a man deprived of his liberty. The higher standard of proof required for a criminal offence does not remove the incongruity.

[Section 14 - Competence and Compellability]

14 Notwithstanding any other Act, in an application for a declaration of parentage under this Act a married person is a competent and compellable witness to testify as to the parentage of the child in respect of whom the application is made.

Comment

Section 14 - Competence and Compellability

14.1 Section 7 of the *Evidence Act* protects a witness from giving evidence that tends to show that the witness has been guilty of adultery unless the witness has already given evidence in the same action in disproof of the alleged adultery.

14.2 Section 14 of the *Status of Children Act*, which is adapted from the *Parentage and Maintenance Act*, s. 14(1), removes that protection on an application for a declaration of parentage. Here the interest of the child in knowing the true parentage takes precedence.

14.3 The provision may not be strictly necessary because section 7 of the *Evidence Act* has been restricted by judicial interpretation to cases in which adultery is the central issue upon which relief depends (*Dmytrash v. Chalifoux* [1975] 16 R.F.L. 88 (App. Div.)). This being the case, even without the section, both the mother and father would be competent and compellable witnesses in affiliation proceedings and in other proceedings in which adultery is not directly in issue.

[Section 15 - Blood and Genetic Tests]

15(1) On the request of a party to an application for a declaration of parentage or upon its own motion in civil proceedings in which the parentage of a child is in issue, the Court may make an order granting leave to obtain blood tests or any other tests that the Court considers appropriate from any person named in the order and to submit the results in evidence.

(2) An order under subsection (1) may be made subject to any terms and conditions the Court considers proper.

(3) No test shall be performed on a person without his consent.

(4) If a person named in an order under subsection (1) is not capable of giving a consent because of age or incapacity, the consent may be given by the guardian of the person.

(5) If a person named in an order under subsection (1) or the person's guardian, as the case may be, refuses to consent to a test referred to in the order, the Court may draw any inference it considers appropriate and if the person is a party may grant such relief as is claimed against him and refuse such relief as is claimed by him, but the dismissal of proceedings by reason of the refusal of an alleged parent shall be without prejudice to future proceedings on behalf of the child.

Comment

Section 15 - Blood and Other Tests

15.1 Section 15 is modelled on the *Parentage and Maintenance Act*, s. 13.

Subsection 15(1) - Order to undergo blood or other tests

15.2 Subsection 15(1) authorizes the court, on an application for a declaration of parentage or where parentage is in issue in a civil proceeding, to direct the child and any alleged parent to undergo blood tests or other tests that will help establish parentage.

15.3 The results of such tests sort are admissible as evidence under the general law. What section 15(1) does is remove the question whether, in the

absence of a statutory provision, a court can direct that a test can be taken.

15.4 The Ontario Provincial Court has twice upheld the constitutional validity of a statutory provision, in that province, authorizing the court to grant leave to obtain blood tests (*Re Honsinger and Kilmer*, October 11, 1984 (Ont. Prov. Ct.); and *Re N. and D.* (1985) 49 O.R. (2d) 490 (Prov. Ct.)). Moreover, the Ontario High Court has held that leave to obtain blood tests should only be refused where the health of an infant might be prejudicially affected by a test or where the motive for the application was questionable (*Re H. and H.* (1979), 25 O.R. (2d) 219, 100 D.L.R. (3d) 364, 9 R.F.L. (2d) 216 (H.C.)).

15.5 New Brunswick also has a statutory provision, in the *Family Services Act*, s. 110(1), and leave to obtain blood tests was granted in the case of *Comeau v. McMaster* (1985), 67 N.B.R. (2d) 35, 172 A.P.R. 35 (Q.B.).

15.6 The British Columbia Court of Appeal ordered blood tests in the absence of specific legislation in the case of *Re M.C. and L.A.C.* (1990), 66 D.L.R. (4th) 421, holding that it would be wrong to deny the use of the best evidence to the court unless overriding considerations show it to be to the child's detriment. In that case, in divorce proceedings, the husband denied that he was the father of a child born to the wife some time after they had separated.

a. Tests available

15.7 Numerous tests, in addition to blood tests, are available. They include such simple things as comparisons relating to the colour of eyes, bone structure, or position of ear lobes, which require nothing from the persons involved (*McLeod* v. *Hill* [1976] 2 W.W.R. 5931); and finger and palm prints which can be taken with a minimum of inconvenience. Such tests can prove that a person is not the parent of a child, or show a statistical probability that a person is the parent. Sometimes, in conjunction with other evidence pointing towards one person as a possible parent, it may help with positive proof by excluding others.

15.8 More dramatically, the tests now include DNA testing of an individual's cellular blueprint. This testing has become available only recently, is highly accurate and can be performed on a single cell.

15.9 Because genetics is a rapidly developing science, new tests are constantly being developed. Like DNA testing, the new tests may give more accurate results, and be freer from risk and less costly than tests that are now available. In anticipation of future developments, subsection 15(1) is drafted widely to allow for the admission of evidence obtained from tests that are either unknown or too unreliable to be acceptable as evidence today.

Subsection 15(2) - Terms and conditions

15.10 The section does not confine the discretion of the court either as to the decision whether or not to make an order granting leave to obtain blood or other tests, or as to payment of the cost. It is expected that a judge would consider whether or not the test is likely to be of value to the court, and give the person involved an opportunity to be heard, but it is not necessary to legislate about such matters.

Subsections 15(3) and (4) - Consent of the person on whom test performed

15.11 The power of the court to direct blood or other tests does not include the power to force the person to undergo the test. The test can only be performed with the consent of the person to be subjected to it or, where that person is incapacitated by age or mental condition from giving a consent, by the person's guardian.

Subsection 15(5) - Adverse inferences from refusal to undergo test

15.12 The sanction against a person who refuses to consent to a test for which leave has been granted is the drawing of inferences against that person.

[Section 16 - Admission of Parentage]

16 An admission of parentage is admissible in evidence in civil proceedings without proof that it is free and voluntary.

Comment

Section 16 - Admission of parentage

16.1 Case law provides that an admission of parentage is admissible against the father, but if the admission is made to persons in authority it must be shown to have been free and voluntary (*Matheson v. Frederick* [1945] 2 W.W.R. 591 (App. Div.).

16.2 Section 16 dispenses with that requirement.

[Section 17 - *Alberta Rules of Court* Apply in Provincial Court Proceedings]

17(1) In any matter not provided for in this Act or the regulations under this Act, the practice and procedure in the Provincial Court, as far as may be, shall be regulated by analogy to the *Alberta Rules of Court* and the procedures followed in the Court of Queen's Bench.

(2) The Provincial Court may give directions on practice and procedure.

(3) The Provincial Court on application may

(a) vary a rule of practice or procedure,

(b) refuse to apply a rule of practice or procedure, or

(c) direct that some other procedure be followed.

Comment

Section 17 - *Alberta Rules of Court* Apply in Provincial Court Proceedings

17.1 Section 17 is based on *Alta. Reg. 184/85*, s. 1, promulgated under the *Child Welfare Act*, s. 96(1)(c).

17.2 The provision is necessary because the Provincial Court does not have Rules of its own. For example, section 9 of the Act specifies that an application for a declaration of parentage is to be brought by originating notice. Without section 17, no originating notice procedure would exist in the Provincial Court. It is desirable, moreover, that similar procedures be followed regardless of whether the parentage proceedings are brought in the Court of Queen's Bench or the Provincial Court.

[Section 18 - Regulations]

18(1) The Lieutenant Governor in Council may make regulations

(a) prescribing the forms to be used under this Act;

(b) defining a "qualified person" for the purposes of section 10(3); and

(c) prescribing the rules to be followed in a proceeding before the Provincial Court under this Act.

Comment

Subsection 18(1) - Forms

18.1 Subsection 18(1) provides for regulations to be made prescribing the forms to be used under this Act. These include: (i) the form of report to be prepared by a qualified person under section 10(3) with respect to the suitability of a parent to be a guardian; and (ii) the form of affidavit a parent may file with the Director of Vital Statistics under section 12(1)(a) in order to receive notice and give consent in matters affecting the child.

Subsection 18(2) - A qualified person

10.2 Subsection 18(2) provides for regulations to be made defining a "qualified person" under section 10(3). *Alta. Reg. 185/85* under the *Child Welfare Act*, from which section 10(3) is taken, defines a "qualified person" as

(a) a social worker registered under the *Social Workers Act*,

(b) a psychologist registered under the *Psychologists Act*,

(c) a person who holds at least a Bachelor's degree in Social Work from a university or school accredited by the Canadian Association of Schools of Social Work, or

(d) a person who in the opinion of the Minister is qualified because of his academic qualifications or his experience or a combination of his qualifications and his experience.

Subsection 18(3) - Rules in Provincial Court

18.3 Subsection 18(3) provides for regulations to be made prescribing the rules to be followed in a proceeding before the Provincial Court. Under section 17, the *Alberta Rules of Court* and the procedures followed in the Court of Queen's Bench apply where no rules are prescribed.

CONSEQUENTIAL AMENDMENTS

[Section 19 - Amendment of *Alberta Evidence Act*]

19 ***The Alberta Evidence Act is amended by adding the following after section 7(2):***

> **(3) Subsection (1) does not apply to the determination in a civil proceeding of any issue involving the parentage of a child, but evidence given on any such issue tending to show the commission of adultery is inadmissible in any other civil proceeding.**

Comment

Section 19 - Amendment of *Alberta Evidence Act*

19.1 Section 19 amends section 7 of the *Alberta Evidence Act*. That section protects a witness from having to give evidence that tends to show that the witness has been guilty of adultery unless the witness has already given evidence in the same action in disproof of the alleged adultery.

19.2 Section 19 removes the protection conferred by section 7 of the *Alberta Evidence Act* so that in a proceeding where the parentage of a child is in issue there would be no privilege against answering questions that tend to establish adultery. The importance of proving parentage overbears any policy upon which the privilege is based.

[**Section 20 - Amendment of *Change of Name Act***]

20 ***The Change of Name Act is amended***

(a) by adding after section 11(1):

(1.1) If the other parent is a guardian of the child, the consent of that parent is required to change a given name or the surname of a child on an application made under subsection (2), (3), (4), (5) or (6).

***(b) by striking* "out of wedlock" *wherever the words appear in section 11(1), (2), (3), (4), (5) or (6) and substituting* "outside marriage".**

(c) in section 11(6) by striking out* "putative" *wherever it occurs.

Comment

Section 20 - Amendment of *Change of Name Act*

Clause 20(a)

20.1 Clause 20(a) amends section 11 of the *Change of Name Act* by requiring the consent of the other parent, where that parent is a guardian of the child, to the change of a given name or the surname of a child born outside marriage.

Clause 20(b)

20.2 Clause 20(b) brings the language of section 11 into line with the language of the *Status of Children Act* by replacing the phrase born "out of wedlock" with the words born "outside marriage".

Clause 20(c)

20.3 Clause 20(c) strikes out the word "putative" wherever it occurs in section 11. With the enactment of the *Status of Children Act*, the description of the father of a child born outside marriage as "putative" is no longer apt.

[Section 21 - Amendment of *Child Welfare Act*]

21 *The Child Welfare Act is amended:*

(a) by repealing section 1(1)(c) and substituting

(c) "biological father" means the man who

(i) is entitled to a legal presumption that he is the father of a child under section 8 of the *Status of Children Act*,

(ii) is declared to be the father in a declaration of parentage granted under section 9 of the *Status of Children Act*, or

(iii) satisfies the Minister that he is the biological father of the child.

(b) in section 1(1)(k),

(i) by repealing subclause (i) and substituting

(i) a person who is or is appointed a guardian of the child under the *Status of Children Act*,

(ii) by renumbering subclause (ii) as subclause (iii) and adding the following after subclause (i)

(ii) a person who is appointed a guardian of the child under Part 7 of the *Domestic Relations Act*, or

(c) in section 36

(i) by striking out "If a child born out of wedlock" *and substituting* "Unless a declaration or affidavit of parentage has been filed under section 12 of the *Status of Children Act*, if a child born outside marriage", *and*

(ii) by striking "out of wedlock" *and substituting* "outside marriage".

(d) in section 65(1), by striking "in lawful wedlock" *and substituting* "in the circumstances described in section 7 of the *Status of Children Act*".

(e) by renumbering section 77 as section 77.1 and adding:

77 Whenever notice is required to be given or consent obtained in any proceedings before the Court under this Act, the Court shall

(a) consider whether or not notice should be given to, or consent obtained from, any person who

(i) is entitled to a legal presumption of parentage under section 8 of the *Status of Children Act*,

(ii) has filed a declaration or affidavit of parentage under section 12 of the *Status of Children Act*, or

(iii) is registered under 3 of the *Vital Statistics Act* as the father at the joint request of himself and the child's mother, or

any other person, and

(b) direct that notice be given to any person in clause (a) who in the opinion of the Court should have an opportunity to be heard.

Comment

Section 21 - Amendment of *Child Welfare Act*

Clause 21(a)

21.1 Clause 21(a) amends the definition of a "biological father" in section 1(1)(c) of the *Child Welfare Act* to bring it into conformity with the *Status of Children Act*.

Clause 21(b)

21.2 Clause 21(b) amends the definition of a "guardian" in section 1(1)(k) of the *Child Welfare Act* to recognize a guardian named in section 7 of the *Status of Children Act*, appointed under section 9 of the *Status of Children Act*, or appointed under Part 7 of the *Domestic Relations Act*.

Clause 21(c)

21.3 Clause 21(c) amends section 36 of the *Child Welfare Act* to safeguard the requirement to give or serve notice on a father who has registered his parentage with the Director of Vital Statistics in the register provided for in section 12 of the *Status of Children Act*, and is a guardian of the child.

21.4 The amendment also substitutes in section 36 a child born "outside marriage" for a child born "out of wedlock", thereby making the language consistent with the *Status of Children Act*.

Clause 21(d)

21.5 Clause 21(d) amends section 65(1) of the *Child Welfare Act* to equate the relationship of an adopting parent and child to that of a parent who is a guardian, under section 7 of the *Status of Children Act*, from the birth of the child.

Clause 21(e)

21.6 In addition to any notice or consent requirements otherwise specified in the *Child Welfare Act*, clause 21(e) amends that Act to require the Court to consider whether notice should be given to, or consent obtained from, any person who is entitled to a legal presumption of parentage under the *Status of Children Act* or who has filed a declaration or affidavit claiming parentage with the Director of Vital Statistics. The amendment goes on to require the Court to direct that notice of the proceedings be given where the Court is of the opinion that any such person should have an opportunity to be heard.

[Section 22 - Amendment of *Criminal Injuries Compensation Act*]

22 ***The Criminal Injuries Compensation Act is amended in section 1(1)(b) by striking*** **"an illegitimate child and".**

Comment

Section 22 - Amendment of *Criminal Injuries Compensation Act*

22.1 Section 22 removes the reference to "an illegitimate child" from section 1(1)(b) of the *Criminal Injuries Compensation Act*. By giving all children equal status in relation to their parents, the *Status of Children Act* eliminates any need for the specific inclusion of a child born outside marriage in maintenance-related legislation.

[Section 23 - Amendment of *Domestic Relations Act*]

23 *The Domestic Relations Act is amended as follows:*

(a) in section 27(7) by striking out "legitimate children of" *and substituting* "children born to";

(b) by repealing section 47;

(c) in section 48, by renumbering subsection (1) and subsection (1.1) and adding the following

(1) In this section, "parent" means a parent who is a guardian of the child.

(d) in section 55(1)

(i) by adding "each of whom is a guardian" *after* "parent",

(ii) by striking "the children of the marriage" *and substituting* "the children of whom they are the parents";

(e) by adding the following after section 56(5):

(6) This section applies whether the child is born within or outside marriage but does not empower the court to grant custody of the child to a parent who is not a guardian of the child.

(f) by adding the following after section 57:

57.1 Upon any application under this Part which affects the guardianship or custody of or the right of access to a child the court shall

(a) consider whether or not notice should be given to any person who

(i) is entitled to a legal presumption of parentage parent

under section 8 of the *Status of Children Act*,

(ii) has filed a declaration or affidavit of parentage under section 12 of the *Status of Children Act*, or

(iii) is registered under section 3 of the *Vital Statistics Act* as the father at the joint request of himself and the child's mother, or

any other person, and

(b) direct that notice be given to any person in clause (a) who in the opinion of the court should have an opportunity to be heard.

Comment

Section 23 - Amendment of *Domestic Relations Act*

Clause 23(a)

23.1 Clause 23(a) eliminates the reference to the "legitimate" children of a divorced person from section 27(7) of the *Domestic Relations Act* by rewording the provision to speak of children "born to" to a divorced person and that person's spouse.

Clause 23(b)

23.2 Clause 23(b) repeals section 47 of the *Domestic Relations Act* in favour of the guardianship specified in section 7 of the *Status of Children Act*.

Clause 23(c)

23.3 Clause 23(c) amends section 48 of the *Domestic Relations Act* to limit, to a parent who is a guardian, the authority of a parent to appoint a testamentary guardian of a minor child.

Clause 23(d)

23.4 Clause 23(d) amends section 55(1) of the *Domestic Relations Act* by restricting, to parents who are guardians, the authority to make agreements with respect to the custody, control and education of their minor child Section 55 applies irrespective of whether the parents are or have been married to each other.

Clause 23(e)

23.5 Clause 23(e) amends section 56 of the *Domestic Relations Act* to make it clear that section 56 applies irrespective of the marriage of the parents to each other. It also restricts to parents who

are guardians the authority of the Court to grant custody orders.

Clause 23(f)

23.6 In addition to any notice or consent requirements otherwise specified in Part 7 of the *Domestic Relations Act*, clause 23(f) amends that Act to require the Court, on an application that affects the guardianship or custody of or the right of access to a child, to consider whether notice should be given to any person who is entitled to a legal presumption of parentage under the *Status of Children Act* or who has filed a declaration or affidavit claiming parentage with the Director of Vital Statistics. The amendment goes on to require the Court to direct that notice of the proceedings be given where the Court is of the opinion that any such person should have an opportunity to be heard.

[Section 24 - Amendment of *Family Relief Act*]

24 ***The Family Relief Act is amended by repealing section 1(b) and substituting the following:***

(b) "child" includes

(i) a child of a deceased born after the death of the deceased; and

(ii) a child born within or outside marriage.

Comment

Section 24 - Amendment of *Family Relief Act*

24.1 Section 24 amends the definition of "child" in section 1(b) of the *Family Relief Act* by eliminating the special provisions relating to an "illegitimate child" and referring instead to "a child born within or outside marriage". Under the definition, the eligibility of dependent children to be maintained out of the estates of their deceased parents will be the same, whether or not the parents have ever been married to each other.

[Section 25 - Amendment of *Fatal Accidents Act*]

25 ***The Fatal Accidents Act is amended***

(a) in section 1(a), by striking out **"stepdaughter and illegitimate child"** ***and substituting*** **"and stepdaughter";**

(b) in section 8(1)(a), by striking out **"illegitimate or illegitimate"** ***and substituting*** **"born within or outside marriage".**

Comment

Section 25 - Amendment of *Fatal Accidents Act*

Clause 25(a)

25.1 Clause 25(a) amends the definition of "child" in section 1(a) of the *Fatal Accidents Act* by deleting the reference to an "illegitimate child". The result is that all children and their parents will be treated equally, with respect to the benefits available, under the *Fatal Accidents Act* to the members of the family of a person whose death was caused by wrongful act, neglect or default.

Clause 25(b)

25.2 Clause 25(b) amends the definition of "child" in section 8(1)(a) of the *Fatal Accidents Act* to mean a son or daughter, whether "born within or outside marriage". The amendment utilizes the language of the *Status of Children Act* but does not alter section 8 substantively.

[Section 26 - Amendment of *Intestate Succession Act*]

26 ***The Intestate Succession Act is amended:***

***(a) in section 1(b) by striking out* "lawful";**

(b) by repealing sections 13 and 14.

Comment

Section 26 - Amendment of *Intestate Succession Act*

Clause 26(a)

26.1 Clause 26(a) amends the definition of "issue" in section 1(b) of the *Intestate Succession Act* to include to all lineal descendants of the ancestor. The deletion of the word "lawful" removes any implication that the "issue" must be "legitimate" issue.

Clause 26(b)

26.2 Clause 26(b) repeals sections 13 and 14 of the *Intestate Succession Act*. Section 13 of the *Intestate Succession Act* specifies that, in relation to the mother, a child born outside marriage shall be treated as if the child were born within marriage. Section 14 limits the ability of a child born outside marriage to succeed to and through the estate of the father.

26.3 With the repeal of sections 13 and 14, the right to succeed on the intestacy of a relative will no longer differ by reason of the birth of a person in the ancestral chain within or outside marriage.

[Section 27 - Amendment of *Maintenance Order Act*]

27 ***The Maintenance Order Act is amended as follows:***

(a) in section 1(a) by striking out **", but does not include an illegitimate child";**

(b) by adding the following after section 1:

1.1(1) This Act shall be read in conjunction with the *Status of Children Act*.

(2) Notwithstanding anything contained in this Act, a child is not obliged to provide maintenance for his father or paternal grandparents unless the father was, during the child's minority, a guardian of the child.

Comment

Section 27 - Amendment of *Maintenance Order Act*

Clause 27(a)

27.1 Clause 27(a) amends the definition of "child" in section 1(a) of the *Maintenance Order Act* so that the definition does not exclude a child born outside marriage.

Clause 27(b)

27.2 Clause 27(b) adds section 1.1 to the *Maintenance Order Act*. Section 1.1(1) requires that the *Maintenance Order Act* be read in conjunction with the *Status of Children Act*.

27.3 Under section 1.1(2), the obligation of a child born outside marriage to provide maintenance to the father or paternal grandparents, should they become disabled or destitute, would arise only where the father had served the child as a guardian during the child's minority. That is to say, although the child's right to be supported will arise at all events, his obligation to provide support to and through the father will only arise if the father had shown interest and extended the reciprocal rights and obligations of a father to the child when the child was a minor and in need of support.

[Section 28 - Amendment of *Perpetuities Act*]

28 *The Perpetuities Act is amended in section 9(4) by striking out* "or legitimation".

Comment

Section 28 - Amendment of *Perpetuities Act*

28.1 Section 9(4) of the *Perpetuities Act* is amended by deleting the words "or legitimation". The effect is to eliminate any distinction between children born within or outside marriage in deciding any question under the *Perpetuities Act* that turns on the ability of a person to have a child at some particular time.

[Section 29 - Amendment of *Provincial Court Act*]

29 *The Provincial Court Act is amended*

(a) by adding the following after section 32(1):

(1.1) Subsection 1 applies whether the child is born within or outside marriage but does not empower the Court to grant custody of the child to a parent who is not a guardian of the child.

(b) by adding the following after section 32(9):

(10) Unless the Court otherwise orders, notice of an application shall be given to:

(a) a person who is named as a parent of the child in a declaration or affidavit of parentage filed with the Director of Vital Statistics under section 12 of the *Status of Children Act*, and

(b) a man who is registered under section 3 of the *Vital Statistics Act* as the father of the child at the joint request of himself and the mother.

(11) Upon the application the Court shall

(i) consider whether or not any other person should receive notice; and

(ii) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

Comment

Section 29 - Amendment of *Provincial Court Act*

Clause 29(a)

29.1 Clause 29(a) amends section 32 of the *Provincial Court Act* by providing, in section 32(1.1), that where the parents are living apart from one another, the Court may make a custody or access order with respect to their child born within or outside marriage. The authority of the Court to award custody to a parent is restricted to a parent who is a guardian.

Clause 29(b)

29.2 Clause 29(b) amends section 32 of the *Provincial Court Act* by adding subsections (10) and (11). These subsections provide for notice of an application for custody of or access to a child, under section 32.

29.3 Section 32(10) requires that notice be given to a person who has filed, with the Director of Vital Statistics, a declaration or affidavit claiming parentage. Notice must also be given to a man who is registered as the father, under the *Vital Statistics Act*, at the joint request of himself and the mother. The Court may modify or dispense with the notice requirement.

29.4 Section 32(11) requires the Court to consider whether any other person should receive notice of an application for custody or access to a child, and to give notice to any person whom the Court is of the opinion should have an opportunity to be heard.

[Section 30 - Amendment of *School Act*]

30 ***The School Act is amended by adding the following after section 1(1)(a):***

(a.1) "biological father" means a man who is

(i) a guardian of the child under section 7 of the *Status of Children Act*, or

(ii) declared to be the father in a declaration of parentage granted under section 9 of the *Status of Children Act* and appointed a guardian of the child.

(a.2) "biological mother" means the woman who

(i) gave birth to the child, or

(ii) is declared to be the mother in a declaration of parentage granted under section 9 of the *Status of Children Act* and appointed a guardian of the child.

Comment

Section 30 - Amendment of *School Act*

30.1 Section 30 adds the definitions of a "biological father" and a "biological mother" to section 1(1) of the *School Act*. The "biological parent" heads the list, in section 1(2), of the persons who are recognized as parents for the purposes of the *School Act*. The definitions identify parents who are also guardians of the child.

[Section 31 - Amendment of *Vital Statistics Act*]

31 ***The Vital Statistics Act is amended:***

(a) by repealing section 3(3) and substituting:

(3) A father who is not a guardian of the child is not required to comply with subsection (2).

(b) by adding the following after section 3(13):

(14) Upon receipt of a declaration of parentage with guardianship giving directions as to a child's surname the Director shall amend the registration in accordance with the order by making the necessary notation thereon.

(c) by repealing section 5;

(d) by adding the following after section 34(1):

(1.1) Where the parentage of a child born outside marriage is in issue, any certificate, certified copy or photographic print referred to in subsection (1) is admissible in any court in the Province as evidence of the facts certified to be recorded or recorded therein.

(e) by repealing section 34(3) and (4);

(f) by repealing section 49(k).

Comment

Section 31 - Amendment of *Vital Statistics Act*

Clauses 31(a)

31.1 Clause 31(a) amends section 3(3) of the *Vital Statistics Act* to exempt a father who is not a guardian from the obligation to complete and deliver or mail a birth registration form within 10 days after the birth of a child. The repealed section excused "the father of an illegitimate child" from this obligation.

Clause 31(b)

31.2 Clause 31(b) adds section 3(14) to the *Vital Statistics Act*. Section 3(14) requires the Director of Vital Statistics to amend the registration of a child's surname in accordance with a declaration of parentage giving directions as to a child's surname. Section 9(5)(b) obligates the Court to provide for the child's surname when it grants a declaration of parentage with guardianship.

Clause 31(c)

31.3 Clause 31(c) repeals section 5 of the *Vital Statistics Act*. Registration of the birth of a child as if parents who marry subsequently had been married to each other at the time of the birth becomes pointless when all children enjoy equal status, and rights and obligations in relation to their parents and other kindred.

Clause 31(d)

31.4 Clause 31(d) adds section 34(1.1) to the *Vital Statistics Act*. Section 34(1.1) establishes the admissibility, as evidence of the facts where the parentage of a child born outside marriage is in issue, of a certified copy or photographic print issued by the Director under section 32 of the *Vital Statistics Act*. Under this provision, for example, the registration of the father of a child born outside marriage under section 3 of the *Vital Statistics Act* at the joint request of himself and the mother will provide *prima facie* evidence of paternity where parentage is in issue in proceedings before a court.

Clause 31(e)

31.5 Clause 31(e) repeals section 34(3) and (4) of the *Vital Statistics Act*. These provisions, which prevent registered documents from being used to affect a presumption of legitimacy, are not appropriate under a law that does away with the distinction between children born within and outside marriage.

Clause 31(f)

31.6 Clause 31(f) repeals section 49(k) of the *Vital Statistics Act*. Section 49(k) authorizes the Minister to make regulations prescribing the evidence on which to base the registration of birth where the parents of a child subsequently intermarry. It is linked to section 5 which is repealed by clause 31(c).

[Section 32 - Amendment of *Wills Act*]

32 *Section 36 of the Wills Act is repealed.*

Comment

Section 32 - Amendment of *Wills Act*

32.1 Section 32 repeals section 36 of the *Wills Act*. Section 36 of the *Will Act* provides as follows:

> In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother.

32.2 The enactment of the *Status of Children Act* renders section 36 of the *Wills Act* unnecessary. That is because section 2 of the *Status of Children Act* abolishes all distinction between children born within and outside marriage. Moreover, section 9 expressly abolishes the rule of construction of instruments and enactments at common law whereby they are construed to refer to legitimate relationships in the absence of evidence of a contrary intention.

[Section 33 - Amendment of *Workers' Compensation Act*]

33 *Section 1(1)(c) of the Workers' Compensation Act is amended by striking* "out of wedlock" *and substituting* "outside marriage".

Comment

Section 33 - Amendment of *Workers' Compensation Act*

33.1 Section 33 amends the definition of "child" in section 1(1)(c) of the *Workers' Compensation Act* to bring the language into conformity with the language of the *Status of Children Act*. No substantive change is involved.

[Section 34 - Repeal of *Legitimacy Act*]

34 ***The Legitimacy Act is repealed.***

Comment

Section 34 - Repeal of *Legitimacy Act*

34.1 Section 34 repeals the *Legitimacy Act*. The *Legitimacy Act* legitimates children born or conceived of all voidable marriages and children born or conceived of most void marriages. The *Status of Children Act* removes the distinction between legitimate and illegitimate children, rendering the *Legitimacy Act* unnecessary and redundant.

[Section 35 - Coming Into Force]

35 ***This Act comes into force on Royal Assent.***

Comment

Section 35 - Coming Into Force

35.1 Section 35 states when the *Status of Children Act* will come into force. According to section 4(1) of the *Interpretation Act,* if an Act does not state when it comes into force, it comes into force on Royal Assent. Section 35 therefore may be unnecessary, but its inclusion points out that attention must be given to the date when the Act will take effect.

APPENDIX

List of Current Alberta Statutes Considered

Administration of Estates Act, R.S.A. 1980, c. A-1
Alberta Evidence Act, R.S.A. 1980, c. A-21
Change of Name Act, R.S.A. 1980, c. C-4
Child Welfare Act, S.A. 1984, c. C-8.1
Criminal Injuries Compensation Act, R.S.A. 1980, c. C-33
Domestic Relations Act, R.S.A. 1980, c. D-37
Family Relief Act, R.S.A. 1980, c. F-2
Fatal Accidents Act, R.S.A. 1980, c. F-5
Income Support Recovery Act, R.S.A. 1990, c. I-1.7
Interpretation Act, R.S.A. 1980, c. I-7
Intestate Succession Act, R.S.A. 1980, c. I-9
Judicature Act, R.S.A. 1980, c. J-1
Legitimacy Act, R.S.A. 1980, c. L-11
Maintenance Order Act, R.S.A. 1980, c. M-1
Maintenance and Recovery Act, R.S.A. 1980, c. M-2
Marriage Act, R.S.A. 1980, c. M-6
Married Women's Act, R.S.A. 1980, c. M-7
Minors' Property Act, R.S.A. 1980, c. M-16
Parentage and Maintenance Act, S.A. 1990, c. P-0.7
Provincial Court Act, R.S.A. 1980, c. P-20
Public Trustee Act, R.S.A. 1980, c. P-36
School Act, S.A. 1988, c. S-3.1
Social Development Act, R.S.A. 1980, c. S-16
Vital Statistics Act, R.S.A. 1980, c. V-4
Wills Act, R.S.A. 1980, c. W-11
Workers' Compensation Act, S.A. 1981, c. W-16